Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

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DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

(T.D. 74-165)

Countervailing Duties—Die presses from Italy

Notice of countervailing duties to be imposed under section 303, Tariff Act of 1930, by reason of the payment or bestowal of a bounty or grant upon the manufacture, production or exportation of die presses from Italy

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

TITLE 19—CUSTOMS DUTIES

CHAPTER 1—UNITED STATES CUSTOMS SERVICE

PART 159—LIQUIDATION OF DUTIES

In the Federal Register of December 5, 1973 (38 F.R. 33502), the Commissioner of Customs announced that information had been received in proper form pursuant to section 159.47(b) of the Customs Regulations (19 CFR 159.47(b)) which appeared to indicate that certain payments or bestowals made by the Government of Italy on the exportation from Italy of die presses constitute the payment or bestowal of a bounty or grant, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930 (19 U.S.C. 1303) upon the manufacture, production or exportation of the merchandise to which the payments apply. The notice provided interested parties 30 days from the date of publication to submit data, views, or arguments with regard to the existence or nonexistence and the net amount of a bounty or grant.

An investigation was conducted pursuant to section 159.47(c) of the Customs Regulations (19 CFR 159.47(c)).

After consideration of all information received, the United States Customs Service is satisfied that exports of die presses from Italy are subject to bounties or grants within the meaning of section 303.

Accordingly, notice is hereby given that die presses imported directly or indirectly from Italy, if entered for consumption or withdrawn from warehouse for consumption after the expiration of 30 days after publication of this notice in the Customs Bulletin, will

be subject to payment of countervailing duties equal to the net amount of any bounty or grant determined or estimated to have been paid or bestowed.

In accordance with section 303, the net amount of the bounties or grants, under the information presently available, has been ascertained and determined or estimated to be 15.74 Lire per kilogram, unless satisfactory evidence is provided with respect to any particular importation that a lesser amount is involved. In view of fluctuations in the amount of the bounties or grants, additional declarations of the net amount of the bounties or grants ascertained and determined or estimated to have been paid upon the exportation of die presses from Italy may be published in subsequent issues of the Customs Bulletin.

Effective on the 31st day after the date of publication of the notice in the Customs Bulletin and until further notice, upon the entry for consumption of such dutiable die presses imported directly or indirectly from Italy which benefit from these bounties or grants, there shall be collected, in addition to any other duties estimated or determined to be due, countervailing duties in the amount ascertained in accordance with the above declarations.

The liquidation of all entries for consumption or withdrawals from warehouse for consumption of such dutiable die presses and parts thereof imported directly or indirectly from Italy which benefit from these bounties or grants and are subject to the order shall be suspended pending further declaration of the net amount of the bounties or grants paid. A deposit of the estimated countervailing duty, in the appropriate amount, shall be required at the time of entry for consumption or withdrawal from warehouse for consumption.

Any merchandise subject to the terms of this order shall be deemed to have benefited from a bounty or grant if such bounty or grant has been or will be paid or credited, directly or indirectly, upon the manufacture, production, or exportation of such die presses.

The table in section 159.47(f) of the Customs Regulations (19 CFR 159.47(f)) is amended by inserting after the last entry for Italy the words "die presses" in the column "Commodity," the number of this Treasury decision in the column headed "Treasury Decision," and the words "Bounty Declared—Rate" in the column headed "Action."

(R.S. 251, secs. 303, 624; 46 Stat. 687, 759; 19 U.S.C. 66, 1303, 1624.)

(ADM-9-03)

VERNON D. ACREE,
Commissioner of Customs.

Approved June 5, 1974:

DAVID R. MACDONALD,
Assistant Secretary of the Treasury.

[Published in the Federal Register June 10, 1974 (39 FR 20369)]

(T.D. 74-166)

Antidumping—Picker sticks from Mexico

The Secretary of the Treasury makes public a finding of dumping with respect to picker sticks from Mexico. Section 153.43, Customs Regulations, amended

DEPARTMENT OF THE TREASURY,
Washington, D.C., June 6, 1974.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 153—ANTIDUMPING

Section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), gives the Secretary of the Treasury responsibility for determination of sales at less than fair value. Pursuant to this authority the Secretary of the Treasury has determined that picker sticks from Mexico are being, or are likely to be, sold at less than fair value within the meaning of section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)). (Published in the Federal Register of February 7, 1974 (39 F.R. 4789).)

Section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), gives the United States Tariff Commission responsibility for determination of injury or likelihood of injury. The United States Tariff Commission has determined, and on May 6, 1974, it notified the Secretary of the Treasury that an industry in the United States is being injured or is likely to be injured by reason of the importation of picker sticks from Mexico that are being, or are likely to be, sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended. (Published in the Federal Register of May 10, 1974 (39 F.R. 16939).)

On behalf of the Secretary of the Treasury, I hereby make public these determinations, which constitute a finding of dumping with respect to picker sticks from Mexico.

Section 153.43 of the Customs Regulations is amended by adding the following to the list of findings of dumping currently in effect:

Merchandise	*Country*	*T.D.*
Picker sticks	Mexico	74-166

(Secs. 201, 407, 42 Stat. 11, as amended, 18; 19 U.S.C. 160, 173.)
(APP-2-04)

DAVID R. MCDONALD,
Assistant Secretary of the Treasury.

[Published in the Federal Register June 10, 1974 (39 FR 20370)]

(T.D. 74-167)

Foreign currencies—Daily rates for countries not on quarterly list

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, Philippine peso, Singapore dollar, Thailand baht (tical)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 5, 1974.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies shown below. These rates of exchange are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR, Part 159, Subpart C).

Hong Kong dollar:

May 27, 1974	Holiday
May 28, 1974	$0.1975
May 29, 1974	.1980
May 30, 1974	.1975
May 31, 1974	.1975

Iran rial:

May 27, 1974	Holiday

For the period May 28 through May 31, 1974, rate of $0.0149.

Philippines peso:

May 27, 1974	Holiday
May 28, 1974	$0.1490
May 29, 1974	.1490
May 30, 1974	.1490
May 31, 1974	.1485

Singapore dollar:

May 27, 1974	Holiday
May 28, 1974	$0.4130
May 29, 1974	.4150
May 30, 1974	.4120
May 31, 1974	.4130

Thailand baht (tical):

May 27, 1974---------- Holiday
For the period May 28, through May 31, 1974, rate of $0.0495.

(LIQ-3-O:D:T)

R. N. MARRA,
Director,
Duty Assessment Division.

(T.D. 74-168)

Foreign currencies—Certification of rates

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 23, 1974.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified the following rates of exchange which varied by 5 per centum or more from the quarterly rate published in Treasury Decision 74-124 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following daily rates:

Austria schilling:

May 13, 1974	$0.0562
May 14, 1974	.0571
May 15, 1974	.0563
May 16, 1974	.0530*
May 17, 1974	.0566

Belgium franc:

May 13, 1974	$0.027010
May 14, 1974	.027275

Denmark krone:

May 13, 1974	$0.1728
May 14, 1974	.1733

Germany deutsche mark:	
May 13, 1974	$0.4173
May 14, 1974	.4160
Netherlands guilder:	
May 13, 1974	$0.3960
May 14, 1974	.3957
Norway krone:	
May 13, 1974	$0.1927
May 14, 1974	.1910
Sweden krona:	
May 13, 1974	$0.2389
May 14, 1974	.2389
Switzerland franc:	
May 13, 1974	$0.3540
May 14, 1974	.3560
May 15, 1974	.3287*
May 16, 1974	.3457
May 17, 1974	.3455

(LIQ-3-O:D:T)

R. N. MARRA,
Director,
Duty Assessment Division.

*Use Quarterly Rate.

[Published in the Federal Register June 13, 1974 (39 FR 20705)]

(T.D. 74-169)

Antidumping—Ceramic wall tile from the United Kingdom

The Secretary of the Treasury makes public a modification of the finding of dumping with respect to ceramic wall tile from the United Kingdom. Section 153.43, Customs Regulations, amended

Department of the Treasury,
Washington, D.C., June 7, 1974.

TITLE 19—CUSTOMS DUTIES

CHAPTER 1—UNITED STATES CUSTOMS SERVICE

PART 153—ANTIDUMPING

On March 26, 1974, there was published in the Federal Register (39 F.R. 11207) a "Notice of Tentative Determination to Modify or Re-

voke Dumping Finding" with respect to ceramic wall tile from the United Kingdom. A finding of dumping applicable to this merchandise was published as T.D. 71–129, in the Federal Register of May 18, 1971 (36 F.R. 9009).

The above-mentioned notice set forth the reasons for the proposed modification, and interested persons were afforded an opportunity to make written submissions in connection therewith.

No written submissions having been received, I hereby determine that, for the reasons stated in the "Notice of Tentative Determination to Modify or Revoke Dumping Finding," ceramic wall tile from the United Kingdom is no longer being, nor is it likely to be, sold in the United States at less than fair value by Pilkington's Tiles Sales Ltd., Manchester, England, and the finding of dumping with respect to such merchandise is hereby modified to exclude ceramic wall tile produced and sold by this company. Accordingly, section 153.43 of the Customs Regulations is amended to show the exclusion of ceramic wall tile produced and sold by this company from the finding of dumping:

Merchandise	*Country*	*T.D.*	*Modified by*
Ceramic wall tile, except that produced and sold by Pilkington's Tiles Sales Ltd., Manchester, England	United Kingdom	71–129	74–169

(Secs. 201, 407, 42 Stat. 11, as amended, 18; 19 U.S.C. 160, 173.)
(APP–2–04)

DAVID R. MACDONALD,
Assistant Secretary of the Treasury.

[Published in the Federal Register June 14, 1974 (39 FR 20786)]

(T.D. 74–170)

Cotton textiles—Restriction on entry

Restriction on entry of cotton textiles and cotton textile products in all 64 categories manufactured or produced in Haiti

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 11, 1974.

There is published below the directive of May 31, 1974, received by the Commissioner of Customs from the Chairman, Committee for the Implementation of Textile Agreements, concerning the restriction on entry into the United States of cotton textiles and cotton textile prod-

ucts in all 64 categories manufactured or produced in Haiti. This directive further amends but does not cancel that Committee's directive of September 28, 1973 (T.D. 73-291).

This directive was published in the Federal Register on June 5, 1974 (39 FR 19976), by the Committee.

(QUO-2-1)

R. N. MARRA,
Director,
Duty Assessment Division.

THE ASSISTANT SECRETARY OF COMMERCE
WASHINGTON, D.C. 20230

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

May 31, 1974.

COMMISSIONER OF CUSTOMS
Department of the Treasury
Washington, D.C. 20229

DEAR MR. COMMISSIONER:

This directive further amends but does not cancel the directive issued to you on September 28, 1973 by the Chairman of the Committee for the Implementation of Textile Agreements, which directed you to prohibit entry during the twelve-month period beginning October 1, 1973 of cotton textiles and cotton textile products in certain specified categories, produced or manufactured in Haiti, in excess of designated levels of restraint. The directive of September 28, 1973 was previously amended by directive of December 5, 1973.

Pursuant to paragraph 16 of the Bilateral Cotton Textile Agreement of November 3, 1971, as amended, between the Governments of the United States and Haiti, and in accordance with the procedures of Executive Order 11651 of March 3, 1972, you are directed, effective as soon as possible, and for the period extending through September 30, 1974, to prohibit entry into the United States for consumption and withdrawal from warehouse for consumption of cotton textiles and cotton textile products in Categories 1 through 64, produced or manufactured in Haiti, in excess of an adjusted level of restraint of 3,568,708 square yards equivalent.[1]

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[1] This level has been adjusted to reflect entries charged through March 31, 1974 for categories not subject to specific ceilings. It has not been adjusted to reflect entries in Categories 39, 51, 53, and 63.

Cotton textiles and cotton textile products in categories other than Categories 39, 51, 53 and 63, produced or manufactured in Haiti, and which have been exported to the United States prior to October 1, 1973 shall not be subject to this directive.

Cotton textiles and cotton textile products in categories other than Categories 39, 51, 53 and 63 which have been released from custody of the U.S. Customs Service under the provisions of 19 U.S.C. 148(b) prior to the effective date of this directive shall not be denied entry under this directive.

A detailed description of the categories in terms of T.S.U.S.A. numbers and factors for converting category units into equivalent square yards was published in the Federal Register on January 25, 1974 (39 F.R. 3430).

In carrying out the above directions, entry into the United States for consumption shall be construed to include entry for consumption into the Commonwealth of Puerto Rico.

The actions taken with respect to the Government of Haiti and with respect to imports of cotton textile products from Haiti have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

SETH. M. BODNER,
Chairman, Committee for the Implementation of Textile Agreements, and
Deputy Assistant Secretary for Resources and Trade Assistance

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D 1123)

S.G.B. STEEL SCAFFOLDING & SHORING CO., INC. *v.* THE UNITED STATES

No. 5542 (—F.2d—)

1. CLASSIFICATION—SHORE FRAME SYSTEM—TSUS

Customs Court decision dismissing civil action challenging classification of imported shore frames as other articles of iron or steel within item 657.20, Tariff Schedules of The United States (TSUS), and rejecting importer's claim that shore frames and lifting machines within item 664.10, TSUS, affirmed.

United States Court of Customs and Patent Appeals, June 6, 1974

Appeal from United States Customs Court, 72-5-00981

[Affirmed.]

Siegel, Mandell & Davidson, attorneys of record, for appellant. *Joshua M. Davidson* and *Allan H. Kamnitz*, of counsel.

Irving Jaffe, Acting Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *John A. Gussow*, for the United States.

[Oral argument on April 1, 1974, by Mr. Kamnitz and Mr. Gussow]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE and MILLER, *Associate Judges*.

LANE, Judge.

[1] This appeal is from the decision and judgment of the United States Customs Court reported at 70 Cust. Ct. 158, C.D. 4423, 361 F. Supp. 631 (1973), dismissing the civil action brought to challenge the Regional Commissioner's classification of certain imported shore frames within item 657.20 TSUS as other articles of iron or steel. We affirm.

Appellant contends that the imported shore frames are merely an improved version of a single-pole vertical shore and should be classified within item 664.10 TSUS relating to elevators, hoists, winches, cranes, jacks, etc. The trial court which heard the witnesses and examined the exhibits found that the shore frame system consisted of a number of components fitted and used together to short formwork into which reinforced concrete is poured, as a temporary support until the load can sustain itself. The shore frame system is composed of two parallel poles connected by horizontal bars. Other components, illustrated in plaintiff's exhibit #2, include the base plate assembly, the adjustment screw assembly or bottom jack, the staff connector or upper jack, the shore staff assembly, the shore heads, and the cross braces.

After consideration of appellant's arguments, we have concluded that we are in full agreement with the opinion of the trial judge and we adopt it as our own. The judgment is *affirmed.*

MILLER, Judge, dissenting.

Although the horizontal bars and cross-braces cause the merchandise in question to be more than single pole shores, that fact does not prevent its classification under item 664.10 as lifting machinery. This court, in holding that single pole, adjustable shores were "machines" for purposes of paragraph 372 of the Tariff Act of 1930, quoted with approval the following definition of "machine":

> Any device consisting of two or more resistant, relatively constrained parts, which, by a certain predetermined intermotion, may serve to transmit and modify force and motion so as to produce some given effect or to do some desired kind of work; * * *

Brauner & Co. v. *United States*, 59 CCPA 24, C.A.D. 1030, 451 F. 2d 646 (1971). Moreover, no new function or functions were derived by appellant's shore frames from the addition of the horizontal bars and cross-braces. They were merely rendered more stable and safe in performing their function as lifting machinery. Cf. *United States* v. *Flex Track Equipment Ltd.*, 59 CCPA 97, C.A.D. 1046, 458 F. 2d 148 (1972).

The decision and judgment of the Customs Court should be reversed.

(C.A.D. 1124)

C. J. TOWER & SONS OF BUFFALO, INC. *v.* THE UNITED STATES No. 5526
(— F. 2d —)

1. CLASSIFICATION—CONVEYOR PARTS—TSUS

Customs Court decision overruling importer's protest against classification of imported rough steel castings as parts of furnaces

under item 661.30, Tariff Schedules of The United States (TSUS), and rejecting importer's primary claim that castings are parts of conveyors under item 664.10, TSUS, and importer's alternative claim that castings are parts of machinery for the treatment of materials by a process involving a change of temperature under item 661.70, TSUS, affirmed.

United States Court of Customs and Patent Appeals, June 6, 1974

Appeal from United States Customs Court, C.D. 4379

[Affirmed.]

Glad & Tuttle, attorney of record, for appellant. *George R. Tuttle*, of counsel. *Irving Jaffe*, Acting Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *John N. Politis*, for the United States.

[Oral argument on April 2, 1974, by Mr. Tuttle and Mr. Politis]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE and MILLER, *Associate Judges*.

LANE, Judge.

[1] This is an appeal from the decision and judgment of the Second Division of the United States Customs Court reported at 69 Cust. Ct. 105, C.D. 4379 (1972), overruling appellant's protest to the classification of imported rough steel castings. The trial court concluded that the imported merchandise was in fact parts of furnaces and had been properly classified under item 661.30 TSUS. Appellant contends that the imported merchandise should be classified under item 664.10 TSUS relating to elevators, hoists, winches, cranes, jacks, pulley tackle, belt conveyors, etc. and parts thereof. As an alternative, appellant contends for classification under item 661.70 TSUS relating to industrial machinery for the treatment of materials by a process involving a change of temperature, etc. and parts thereof.

The trial court found from the testimony and the exhibits that the imported merchandise comprises rough castings which were subsequently machined and assembled in this country as parts of a conveyor utilized in a pelletizing plant. The trial court also found that the purpose of the pelletizing plant in which the castings were used is to transform iron ore pellets by the application of heat in order to make the pellets suitable for use in a blast furnace.

Upon consideration of appellant's arguments on the meaning of the term furnace, and that pelletizing machines are a separate commercial entity designed for use in conjunction with a furnace, we conclude that the decision of the lower court is correct. We agree that the imported castings cannot be classified under item 664.10 because of headnote 1 of subpart A which provides that a machine or appliance which is described in subpart A and also described in other subparts of part 4 is classifiable under subpart A. We likewise agree that the imported castings cannot be classified under item 661.70 since this item is less specific than item 661.30.

The judgment below is *affirmed*.

Decisions of the United States Customs Court

Customs Decisions

(C.D. 4544)

F. W. MYERS & CO., INC.
A. H. BOTTORFF CO.
v.
UNITED STATES

Special dumping duties—1921 Antidumping Act

Under the Antidumping Act of 1921, if a finding of dumping is published by the Secretary of the Treasury, customs officers are

required to assess antidumping duties which are equal, if the exporter and importer are not related, to the amount by which the importer's purchase price for the merchandise is less than the foreign market value. In assessing these duties, in the event sales in the home market are made under circumstances which differ from those incurred in sales to the United States, adjustments to foreign market value must be made by the customs officers for such differences in order to place the sales on a basis as nearly equivalent as practicable.

Held: Plaintiffs have not proven that the district director of customs, in determining the amount of special dumping duties involved here, erred in failing to make an appropriate allowance in computing foreign market value for the difference between the Canadian home consumption price and the export price to the United States.

SPECIAL DUMPING DUTIES—WITHHOLDING OF APPRAISEMENT

Construing the customs regulations in *pari materia*, customs appraisers are required to withhold appraisements on shipments subject to possible special dumping duties upon receipt of the Commissioner of Customs' original "Withholding of Appraisement Notice."

SPECIAL DUMPING DUTIES—SALES AT LESS THAN FAIR VALUE

Under the Antidumping Act, the court may review the Secretary of the Treasury's findings of sales at less than fair value only to determine whether the Secretary acted within the scope of his authority and correctly construed the pertinent statutory language. The court may not go further and weigh the evidence or review the conclusions the Secretary drew therefrom.

Court Nos. R67/16567, etc. R67/10201, etc.

Port of Detroit

[Judgment for defendant.]

(Decided May 28, 1974)

Barnes, Richardson & Colburn (*Joseph Schwartz* and *Irving Levine* of counsel) for the plaintiffs.

Carla A. Hills, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

James R. Sharp, amicus curiae.

MALETZ, Judge: These actions, which were tried jointly, involve the assessment under the Antidumping Act of 1921, as amended (19 U.S.C. 160 et seq.) of special dumping duties against various styles of hand-operated steel jacks that were manufactured and sold by J. C. Hallman Manufacturing Co., Limited of Kitchener, Ontario, Canada (Hallman) and purchased by A. H. Bottorff Co., Inc. of St. Joseph,

Missouri (Bottorff).[1] The jacks were exported from Canada during the period from December 27, 1964 through June 8, 1966 and entered at the port of Detroit.

I

Helpful in understanding the issues in this case is a brief summary of the Antidumping Act and its administration.[2] In essence, that act provides that if a foreign exporter sells merchandise to the United States at a price less than its "fair value," i.e., the price charged by the exporter in his home market [3]—with resultant injury to a U.S. industry—a special dumping duty will be assessed upon the importation of the merchandise. If the exporter and importer are not related, this duty is measured by the difference between the higher "foreign market value" and the lower price charged the U.S. importer.

The question as to whether merchandise is being sold at less than fair value is determined by the Secretary of the Treasury. If the Secretary makes an affirmative finding in this regard, the question as to whether there is injury is determined by the Tariff Commission. If the Commission makes a determination of injury, the Secretary makes and publishes a finding of dumping. Once the finding of dumping has been published, customs officers proceed to assess and collect dumping duties which (as noted before) are equal, if the exporter and importer are not related, to the amount by which the American importer's purchase price is less than the foreign market value. In assessing such duties, in the event sales in the home market are made under circumstances which differ from those incurred in sales to the United States, adjustments must be made by the customs officers for differences in quantities and other circumstances of sale in order to place the sales on a basis as nearly equivalent as practicable.

With respect to administration of the act, antidumping investigations are usually triggered by the complaint of an affected domestic industry filed with the Commissioner of Customs. Upon receipt of such a complaint with supporting information, the Commissioner conducts

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[1] At a pretrial conference, plaintiffs abandoned their claims as to so-called "wheel-it" jacks which were covered by Court No. R67/16568 in the *Myers* action and Court No. R67/10202 in the *Bottorff* action. The remaining "wheel-it" jacks—which were covered by R67/10212 in the *Bottorff* action—were not referred to by plaintiffs in their pleadings, at the trial or in their brief and their claim as to this item is therefore deemed abandoned. See e.g., *Nurserymen's Exchange* v. *United States*, 41 Cust. Ct. 223, C.D. 2044 (1958).

[2] In setting out this summary, I have borrowed heavily from summaries of the act and its administration which were prepared for the Senate Committee on Finance by the Executive Branch and by a Special Assistant to the Secretary of the Treasury. See Vol. 1 *Compendium of Papers on Legislative Oversight—Review of U.S. Trade Policies*, Committee on Finance, United States Senate, Committee Print (90th Cong., 2d Sess., 1968) pp. 73 et seq., and pp. 156 et seq.

[3] "Fair value" is not defined in the law but, as later discussed, is defined in the customs regulations.

a summary investigation to determine whether grounds exist for further consideration of the case. If he concludes that such grounds do exist, he publishes an "antidumping Proceeding Notice" briefly describing what is at issue and conducts a preliminary investigation based on the examination of invoices and other information immediately available to him. Should the Commissioner determine from this preliminary investigation that reasonable grounds exist to believe or suspect that sales at less than fair value are taking place, he orders the withholding of appraisement of shipments of the merchandise being imported into the United States and publishes a "Withholding of Appraisement Notice." This action insures that in the event a dumping finding is made, the government will be able to collect any antidumping duties which may be due on these shipments.

After publishing the "Withholding of Appraisement Notice," the Commissioner conducts a full-scale investigation upon completion of which he makes a report of his findings to the Secretary of the Treasury. When the Secretary reaches his conclusion in the matter, he publishes a "Notice of Tentative Determination" which includes a statement of reasons for his action. Interested parties are thereupon given an opportunity to submit argument or appear in person in support of or in opposition to the tentative determination.

After examination of the arguments and evidence submitted in response to the tentative determination, the Secretary publishes a final determination. If the final determination is that sales at less than fair value are taking place, the case is referred to the Tariff Commission for a determination as to whether a U.S. industry has been injured. In turn, if the Commission, after such investigation as it deems necessary, makes a determination of injury, it so notifies the Secretary of the Treasury. The Secretary thereupon publishes a finding of dumping, and customs officers then assess antidumping duties on any shipment where, if the exporter and importer are not related, the U.S. purchase price is less than the foreign market value. As previously mentioned, in assessing such duties, if sales in the home market are made under circumstances which differ from those incurred in sales to the United States, adjustments in the duty amount are required to be made for differences in quantities and circumstances of sale.

II

Pertinent to the proceedings which led to the imposition of the dumping duties here in issue is section 201 of the Antidumping Act of 1921, as amended (19 U.S.C. 160),[4] which provides in relevant part:

[4] All U.S.C. references here and hereafter are to the 1964 edition.

(a) Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160–173 of this title called a "finding") of his determination and the determination of the said Commission. * * *

(b) Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, the Secretary has reason to believe or suspect, from the invoice or other papers or from information presented to him or to any person to whom authority under this section has been delegated, that the purchase price is less * * * or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value), he shall forthwith publish notice of that fact in the Federal Register and shall authorize, under such regulations as he may prescribe, the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping has been raised by or presented to him or any person to whom authority under this section has been delegated, until the further order of the Secretary, or until the Secretary has made public a finding as provided for in subdivision (a) in regard to such merchandise.

(c) The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the United States Tariff Commission, upon making its determination under subsection (a) of this section, shall each publish such determination in the Federal Register, with a statement of the reasons therefor, whether such determination is in the affirmative or in the negative.

Pursuant to these statutory provisions, the following administrative actions—which culminated in the present controversy—took place:

On April 23, 1965, the Acting Commissioner of Customs issued an "Antidumping Proceeding Notice"—which was published in the Federal Register on April 30, 1965 (30 F.R. 6123)—stating that the Commissioner of Customs had received information that steel jacks imported from Canada, manufactured by Hallman, were being, or likely to be, sold at less than fair value, and that the Bureau of Customs was instituting an inquiry into the matter.

On May 3, 1965, the Acting Commissioner of Customs issued a "Withholding of Appraisement Notice" which was published May 8, 1965 (30 F.R. 6445). The notice stated that there were reasonable grounds to believe or suspect that the "purchase price" or "exporter's sales price" was less or likely to be less than the "foreign market value" of steel jacks imported from Canada manufactured by Hallman and that the appropriate basis of comparison with "foreign market value" would be published in a supplemental notice in the Federal Register as soon as possible.[5] The notice also indicated that customs officers were being directed to withhold appraisement of such steel jacks imported from Canada. In accordance with this directive, the district director at Detroit withheld appraisement of the steel jacks here in issue.

On September 2, 1965, a supplementary "Withholding of Appraisement Notice" was issued by the Commissioner of Customs and published on September 9, 1965 (30 F.R. 11532). This notice referred to the notice published on May 8, 1965—when the then available information was insufficient to determine the appropriate basis of comparison with foreign market value—and stated that the information "now available" disclosed that "purchase price" was the appropriate basis of comparison for fair value purposes.

On December 29, 1965, the Acting Assistant Secretary of the Treasury made a tentative determination, published January 5, 1966 (31 F.R. 100), that the Hallman steel jacks "are being, or are likely to be" sold at less than fair value within the meaning of section 201(a) of the Antidumping Act (19 U.S.C. 160(a)). He stated, as the reasons therefor, that the purchase price was compared with the home market price for fair value purposes and that it was less than the adjusted home market price for each size jack considered.

On May 17, 1966, the Assistant Secretary of the Treasury issued a "Determination of Sales at Less Than Fair Value," published May 24, 1966 (31 F.R. 7485), stating that he had determined, for the reasons set forth in the tentative determination, that steel jacks imported from Canada, manufactured by Hallman, were being, or were likely to be, sold at less than fair value within the meaning of section 201(a) (19 U.S.C. 160(a)).

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[5] If the importer and exporter are dealing at arms' length, the "purchase price," as defined in section 203 of the Antidumping Act (19 U.S.C. 162), i.e., the price paid by the importer to the exporter, with certain specified adjustments, is utilized as the basis for comparison with foreign market value. If, however, the exporter and importer are related, then the "exporter's sales price" as defined in section 204 (19 U.S.C. 163) is utilized. The "exporter's sales price" is the price, with specified adjustments, at which the importer resells to unrelated purchasers. See Secretary of Treasury's report of February 1, 1957 on antidumping which is contained in hearings before the House Ways and Means Committee on H.R. 6006, 6007 and 5120, Amendments to the Antidumping Act of 1921, as Amended (85th Cong., 1st Sess., 1957) pp. 13–14, 21–22.

Upon being informed of the Assistant Secretary's determination, the Tariff Commission published a "Notice of Investigation" on May 25, 1966 (31 F.R. 7534), advising that it had instituted an investigation under section 201(a) to determine whether an industry in the United States was being, or was likely to be injured, or prevented from being established by reason of the importation of such merchandise into the United States. On June 10, 1966, the Commission issued a notice that a public hearing would be held on July 6, 1966 (31 F.R. 8185).

Thereafter, in an opinion published on August 24, 1966 (31 F.R. 11197) the Tariff Commission (with two Commissioners dissenting) determined that an industry in the United States was likely to be injured by reason of the importation of the Hallman steel jacks from Canada, sold at less than fair value. In accordance with section 201(a) of the act (19 U.S.C. 160(a)), the Assistant Secretary of the Treasury issued a finding of dumping on September 1, 1966 with respect to such jacks, which was published on September 13, 1966 as T.D. 66–191 (31 F.R. 11974).

Upon publication of the dumping finding, the jacks were appraised by the Detroit district director with respect to their foreign market value and purchase price, as required by section 209 of the Antidumping Act (19 U.S.C. 168) [6] in order to determine the amount of special dumping duty that was to be levied, i.e., an amount equal to the difference between the two figures. Section 202(a) (19 U.S.C. 161(a)).[7]

The purchase prices, which were ascertained by the district director pursuant to section 203 (19 U.S.C. 162), are not in issue. Rather, plaintiffs' primary challenge is to the director's determination of

[6] Section 209 (19 U.S.C. 168) provides as follows:

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided in section 160 of this title, and as to which the appraiser or person acting as appraiser has made no appraisement report to the collector before such finding has been so made public, it shall be the duty of each appraiser or person acting as appraiser, by all reasonable ways and means to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of constructed value to the contrary notwithstanding) and report to the collector the foreign market value or the constructed value, as the case may be, the purchase price, * * *

[7] Section 202(a) (19 U.S.C. 161(a)) provides in relevant part:

(a) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 160 of this title, entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under said section has been delegated, and as to which no appraisement report has been made before such finding has been so made public, if the purchase price * * * is less than the foreign market value * * * there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

the foreign market value under sections 205 and 202(b) of the Antidumping Act (19 U.S.C. 164 and 161(b)).

In this connection, section 205 (19 U.S.C. 164) defines foreign market value as—

> * * * the price, at the time of exporation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, or if the Secretary determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, * * *.

This statutory definition of foreign market value is modified in part by section 202(b) (19 U.S.C. 161(b)) which provides that—

> (b) In determining the foreign market value for the purposes of subsection (a) of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the purchase price and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to—
>
> (1) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale for exportation to the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),
>
> (2) other differences in circumstances of sale, * * *
>
> * * * * * * *
>
> then due allowance shall be made therefor.

In applying the foregoing formula, the district director computed the foreign market values for the jacks on the basis of the Canadian list price including 11% sales tax, less 47% quantity discount, less a 1% cash discount, less an advertising and printing allowance of $0.08 Canadian dollars and then converted the result to U.S. dollars using the quarterly rate of exchange in effect at the time of exportation.

Plaintiffs contend, however, that the foreign market values thus found by the district director are incorrect because he did not make an allowance, or made insufficient allowance, under section 202(b) (1) and (2) (19 U.S.C. 161(b) (1) and (2)) for "the difference between the Canadian home consumption price and the export price to the United States due to the difference in the wholesale quantities in which the merchandise was sold in the respective markets, and due to other differences in circumstances of sale" (br. p. 2).

If these allowances were made, plaintiffs allege, they would either lower the foreign market values to the same level as the purchase prices, thereby eliminating the dumping duties entirely, or at least reduce the foreign market values substantially so that the dumping margin (and the duties) would be reduced proportionately.

Plaintiffs also claim that under the customs regulations then in effect, the district director could not legally withhold appraisements of steel jacks entered prior to publication on September 9, 1965 of the supplementary "Withholding of Appraisement Notice," and that appraisement for dumping purposes of entries made prior to that date are invalid.

Finally, plaintiffs urge that the determination of the Assistant Secretary of the Treasury of sales at less than fair value is erroneous.

III

Turning now to the record, plaintiffs called three witnesses: Jacob C. Hallman, president since 1938 of Hallman; Kenneth H. Bottorff, owner of Bottorff; and Charles H. Spry, a Canadian chartered accountant and partner in a Canadian accounting firm. Defendant offered the testimony of John Kokos, a certified public accountant and partner in an Indiana public accounting firm.

The witness Hallman, who directs the operations of the company "in all regards," testified that during the period in question, his company manufactured three separate product lines—steel jacks, electric fencing and accessories, and pipe organs—but had no separate divisions and kept no separate books or records for each product; that 50 to 60 percent of its total sales of steel jacks were to Canadian customers, mostly jobbers, who got varying discounts off the price list depending upon the quantity purchased, which rarely exceeded 300 jacks per order; that about 40 percent of its jack sales were to Bottorff, its exclusive purchaser in the United States, which imported the merchandise for resale to wholesalers and jobbers; that Bottorff purchased in railway carload lots averaging about 2,700 to 3,000 jacks per load and in truck lots averaging about 1,200 to 1,300 jacks per load; and that many more individual sales were made to Hallman's

Canadian customers, because of the smaller quantities involved, than to Bottorff. The witness stated that it was probable that in 1965 and 1966 Hallman sold jacks to countries other than Canada and the United States but indicated that such sales amounted to "less than 10 percent."

Hallman also testified that the following expenses were incurred in his Canadian sales but not in his sales to Bottorff: Sales salaries and commissions, service and demonstration, advertising, truck expense and depreciation, auto expense and depreciation, and donations. He added that the following expenses were greater in the Canadian market than in the United States market: Warehousing of finished goods, traveling expenses, general selling expenses, interest and exchange, discounts allowed, management and office salaries, office expenses, telephone expenses, postage, depreciation of office furniture and general expenses.[8]

During the period in question, the witness Hallman concentrated on selling jacks while three of his four salesmen sold organs, and the fourth sold jacks and organs. Although records were not kept of the expenses incurred for each product, management and office personnel kept time sheets showing how much time was spent on each activity. The salesmen, however, did not keep records to the same extent.

At Hallman's request, its accountant, Spry,[9] prepared in October 1971 an analysis (exhibit 2) [10] comparing the "pricing policies and circumstances of sale relating to the prices charged to Canadian customers" with the prices charged to Bottorff in the United States for the sale of jacks during the period from January 1, 1965 to June 30, 1966. Through a series of calculations, described below, Spry allocated various overhead expenses, which he considered to be costs incurred "in connection with jack sales," between the Canadian and United States markets, and arrived at an overhead cost of $1.07 per unit for sales to Canadian customers and 14 cents per unit for sales to Bottorff. Plaintiffs claim that the resulting 93 cent differential should have been allowed as "other differences in circumstances of sale" under section 202(b)(2) of the Antidumping Act (19 U.S.C. 161(b)(2)) in computing foreign market value. Although this allowance of 93 cents would, according to plaintiff's own calculations, still leave a differential ranging from one to 29 cents between the prices to the Canadian

[8] Bottorff testified that his company incurred the following expenses in connection with the resale of the Hallman jacks in the United States: Salaries and commissions, service and demonstration, advertising, truck expense and depreciation, automobile expense and depreciation, genral selling expense, interest expense, office furniture depreciation, miscellaneous expenses and some donations; and that he ordered in large quantities, usually by the truck load, in order to get the most favorable transportation rates.

[9] Spry, whose firm has been auditor for Hallman since 1955, has personally been in charge of preparing the latter's financial statements since 1958.

[10] Exhibit 2 was received in evidence with the exception of the concluding paragraph.

customers and to Bottorff, plaintiffs contend that this differential is justified under section 202(b)(1) (19 U.S.C. 161(b)(1)) because of the differences in the wholesale quantities sold in the Canadian and United States markets.

Considering exhibit 2 in greater detail, the first tabulation therein lists the number of jacks sold per month to "Canadian Customers" and to Bottorff from January 1, 1965 through June 30, 1966. These figures were based on invoice data obtained from Hallman's clerks which were tested for accuracy by random checking by Spry's staff. Spry stated (R. 104) that the results "were very reliable" and "we were able to reconcile the total value determined with the records of the company, by that I mean total sales." [11]

Exhibit 2 also lists, by size, the total number of jacks sold to Canadian customers and to Bottorff during the period in question, and states that there were 1,399 invoices to Canadian customers averaging 43 jacks per invoice, that only 153 of these sales were for more than 100 jacks, and that the largest Canadian sale was for 400 jacks. During the same period, according to Spry, there were only some 35 invoices made out to Bottorff, averaging 1,475 jacks per invoice.

The various selling, delivery, financial and administrative expenses incurred by Hallman for all of its manufacturing operations for 1965 are also shown in exhibit 2 in tabular form.[12]

This table includes, in addition, a percentage of each of the foregoing expenses that was believed to be "attributable to jacks." However, as previously noted, the actual costs incurred by the jack division could not be ascertained inasmuch as Hallman did not keep separate records of the expenses incurred by each of its product lines.[13] Therefore, Spry explained, in lieu of actual cost figures he utilized the percentage figures for the 1964 calendar year that were set forth in a

[11] How Spry was able to reconcile these invoices with the total sales is unclear, in view of the fact that Hallman also sold jacks to third countries during this period. See, for example, exhibit 3, comprising all Hallman's sales invoices for June, 1965, which included an invoice for a sale of 500 jacks (equal to approximately one-quarter of jack sales to Canadian customers that month) to a company in England.

[12] The expenses thus shown are: Sales salaries and commissions, traveling expenses, service and demonstration, advertising, truck expenses, truck depreciation, general selling expenses, interest and exchange, discounts allowed, management and office salaries, office expenses, telephone, postage, automobile expenses, donations, automobile depreciation, office furniture depreciation and general expenses.

[13] Hallman only kept records of the total overhead costs of its entire manufacturing output. Thus, the annual certified statements of 1964, 1965 and 1966 (exhibits A; 5; and B), which Spry prepared for Hallman's shareholders, list the "Commercial" expenses incurred for all of its business activities under three categories: "Selling" (sales salaries and commissions, traveling, service installation and demonstrations advertising, truck expense, truck depreciation and general selling expenses); "Financial" (interest and exchange, discounts allowed and allowance for doubtful amounts); and "General and administrative" (management and office salaries, office expenses, telephone, postage, automobile expenses and depreciation, donations, depreciation of office furniture and equipment and general expenses).

"statement of income" for "management use only," which statement was prepared by his firm for Hallman in order to enable the latter to determine whether or not to discontinue the manufacture of organs. More particularly, this statement contained a schedule allocating a percentage of each category of "commercial" or overhead expenses to each of Hallman's three product lines. These percentage allocations were not recorded in the books or taken from company records, but were based solely on management estimates which were never checked for reliability or verified independently by Spry's firm.

In turn, Spry used these estimated 1964 percentage allocations in preparing the analysis of 1965 overhead expenses because "they were the only figures available to us" (R. 109). He did not question their accuracy on the stated ground (R. 110) that—

> * * * they were given to us by management and with our knowledge of the business they were reasonable allocations. We had no reason to suggest that they should not be used because they were unreasonable.

In this connection, he added that the allocations were within "the zone of reasonableness" (R. 110).[14]

The next tabulation shown in exhibit 2 allocates the estimated 1965 overhead expenses for jacks between Canadian customers and Bottorff "on the most reasonable basis in each case." The first item listed, namely, "Finished goods warehousing," was determined on the basis of the space allocated for storing finished jacks, while the other expense allocations[15] were based on "management representation to us which appeared reasonable to us" (R. 112).[16]

This "reasonable" method resulted in the following: Of the total estimated jack overhead expenses of $42,683 for 1965, $4,335—or just over 10% of this total—was allocated to the expenses attributable to the export sales to the United States in 1965 of 30,699 units, while the balance—$38,348—was allocated to the expenses attributable to the sales in Canada in 1965 of 35,804 units.

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[14] The "zone" was apparently quite elastic inasmuch as Spry testified that he would have, for example, accepted an estimate of 40 percent instead of the 30 percent allocated to the jack division in 1964 for "management and office salaries"; indeed, he testified that he would also have accepted a figure that was under 30 percent.

[15] See note 12 for the list of itemized expenses.

[16] Spry described the procedure used to allocate expenses between the two markets thusly (R. 113–4):

> For example, we would have the problem of allocating travel expense, $1,993. My question to Mr. Hallman probably would go something like this: "To what extent was traveling involved with your business with Mr. Bottorff? Did you go over to the States? What travel would you do?" And then in response to his answer this allocation would be determined. It is not a mathematically precise determination, your Honor. It is a reasonable estimate made by management which appeared reasonable to us with our long knowledge of the nature of the business.

Dividing the expenses thus allocated to the Canadian and United States markets by the number of units sold in each, Spry arrived at the aforementioned "cost per unit" of $1.07 for sales in Canada and of 14 cents for sales in the United States to Bottorff, resulting in an "additional cost per Canadian unit" of 93 cents (exhibit 2, p. 3).

The next series of calculations contained in exhibit 2 work toward an adjusted sales price, that is, a lower foreign market value for each size jack which was sold to Canadian customers during the period from January 1, 1965 to June 30, 1966. This was done by deducting from the list price (exhibit 1) the 47% quantity discount allowed on sales of 100 or more units, the 11% Canadian sales tax and the 93 cent differential in the overhead expenses or 1965, and then converting the result to United States currency or each of the four sizes of jacks involved.[17] The adjusted figures were worked out separately for each quarter in 1965 and the first two quarters in 1966 (because official currency conversion rates varied in each quarter) and were then compared with the sales prices to Bottorff.

However, as previously noted, even in these adjustments, the prices to Bottorff were lower than those to Canadian customers by amounts ranging in the six quarters from one to 29 cents per unit. In Spry's opinion, the reason for these remaining price differentials was that (R. 119–20):

> The 47 percent discount previously referred to was granted on shipments of 100 units or more. And when one considers that the shipments to Bottorff were in the approximation of 1,400, 1,300 units per invoice, then the additional allowance for that quantity ordered is certainly, in my opinion, sufficient to absorb the variance of 1 to 29 cents per unit.

When questioned as to the methods employed in preparing exhibit 2, Spry agreed that the overhead expenses did not remain constant from year to year; that Hallman's relocation of part of its manufacturing plant in 1965 from Waterloo to Kitchener, Ontario would have affected some of its operations and it was a "possibility" that it affected some of the percentages used; that no attempt was made to allocate expenses to third country sales (which he stated did not exceed 2,000 jacks during this period); that the unit costs of $1.07 and 14 cents for the Canadian and United States markets constituted an "average unit base" without taking into account that some of the units (four different sizes of jacks, as noted before, are involved) may have had higher costs than others; and that he could have obtained a more

[17] The differential of 93 cents determined for the 12 months of 1965 was applied to the entire 18-month period ending June 1966 because it was the only information available (R. 142). Of the invoices involved herein, 22 cover merchandise ordered and exported during 1965, and 11 cover merchandise ordered an exported in 1966.

accurate estimate of the expense allocations between the two markets for 1965 and 1966 if he had used the actual expenses incurred. However, he observed, "[t]o certify to the correct allocation of expenses in this company would be almost an impossible job" (R. 124).

Spry explained that all overhead expenses were included in calculating the costs incurred in connection with jack sales in each market because (R. 144–5):

> [e]very expense that the company has is related to earning its profits. * * * I believe in the final disposition of the jack an expense is a part of the process whether it is selling the jack or whether it is typing the invoice. They are all expenses relative to the business.[18]

IV

Since value determinations made pursuant to the Antidumping Act are presumed by statute to be correct (see section 210 (19 U.S.C. 169 and 28 U.S.C. 2635)), plaintiffs must prove that the district director erred in determining the adjusted foreign market values and then establish that they are entitled to the additional allowance claimed under section 202(b) (19 U.S.C. 161(b)). See e.g., *United States* v. *Fisher Scientific Co.*, 44 CCPA 122, 124, C.A.D. 648 (1957); *Brooks Paper Company* v. *United States*, 40 CCPA 38, 41, C.A.D. 495 (1952); *James C. Goff Company* v. *United States*, 58 CCPA 147, C.A.D. 1019, 441 F. 2d 671 (1971).

In light of these considerations, the primary question is whether plaintiffs have established (1) that an additional 93 cents should have been allowed in computing foreign market value by reason of other differences in circumstances of sale (section 202(b)(2) (19 U.S.C. 161(b)(2)); and (2) that the remaining price spread ranging from 1 to 29 cents between the Canadian sales prices (as adjusted by Spry) and Bottorff's statutory purchase prices should have been allowed because of the differences in wholesale quantities in which the merchandise was purchased in the Canadian and United States markets (section 202(b)(1) (19 U.S.C. 161(b)(1)). Plaintiffs also urge that, irrespective of any allowance for differences in circumstances of sale, Bottorff purchased in sufficiently large quantities, as compared to the

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[18] Defendant's witness, Kokos, was of the opinion that (1) Spry should not have thrown all the general administrative and financial expenses into one category; and (2) should not have distributed them on the basis of selling expenses. He stated that use of 1965 and 1966 figures rather than 1964 figures would have provided a more accurate determination of the percentage allocations in 1965 and 1966. As to exhibit 2, he believed that the allocations were arbitrary since they were management estimates which were not supported by detailed evidence or data. He conceded, however, that he himself, on many occasions, had had to make arbitrary adjustments where no other alternative was available. Further, he agreed that the nature of certain expenses as between various customers might differ due to differences in circumstances of sale.

quantities purchased by Canadian customers, to justify the entire price differential between the two markets.

With specific reference to plaintiffs' first claim, namely their entitlement to the allowance, it must be borne in mind that plaintiffs bear a dual burden. First, they must prove the existence of other differences in "circumstances of sale" within the meaning of the statute—and then prove their monetary value. For the reasons that follow, it must be concluded that plaintiffs have failed in their proofs on both counts.

The term "differences in circumstances of sale" was added in 1958 to section 202(b) (19 U.S.C. 161(b)) by Public Law 85–630 (72 Stat. 583–4), which amended the Antidumping Act of 1921. This was done in order to bring the definition of foreign market value "generally into line with the definition of fair value" [19] as contained in section 14.7(b) of the Customs Regulations, as amended April 8, 1955 (T.D. 53773, p. 96). This section provided in pertinent part:

> (1) *Quantities and circumstances of sale.*—In comparing the purchase price or exporter's sales price, as the case may be, with the sales on which a determination of fair value is to be based, a reasonable allowance may be made for any differences in quantities and circumstances of sale.

Both the Senate and House reports accompanying H.R. 6006, subsequently enacted as Public Law 85–630, included the following explanation: [20]

> *Differences due to "other circumstances of sale"*
>
> Under the bill as reported, provision is made (sec. 202(b)(2) and (c)(2)) for consideration of "other differences in circumstances of sale" in addition to quantity differentials. This is designed to facilitate efficient and fair comparison between foreign market value and price to the United States market. Examples would be differences in terms of sale, credit terms, and advertising and selling costs.

The Treasury Department, which, as previously pointed out (note 19), had submitted an Explanatory Memorandum on H.R. 6006 to the Senate Finance Committee, described this amendment as follows (Senate Hearings, p. 19):

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[19] See Treasury Department Explanatory Memorandum, *Hearings before the Senate Committee on Finance on H.R. 6006 to Amend Certain Provisions of the Antidumping Act of 1921* (85th Cong., 2d Sess., 1958) p. 19 (hereafter referred to as "Senate Hearings"). It is to be noted that the term "fair value" is not defined anywhere in the Antidumping Act.

[20] S. Rep. No. 1619 (85th Cong., 2d Sess., 1958), 2 U.S. Cong. & Admin. News (1958) p. 3504; H. Rep. No. 1261 (85th Cong., 1st Sess., 1957) p. 7.

(3) A further change in section 202(b) requires that allowance be made for differences in circumstances of sale in determining foreign market value. An example would be the payment of advertising expenses in the United States by a manufacturer attempting to introduce a product into the United States market, whereas in the home market the advertising expenses are borne by the distributors. Under the present law this would not constitute any basis for the assessment of dumping duties. The amendment would require that the amounts expended by the manufacturer for advertising in connection with his sales to the United States be added to his home market price for the purpose of determining foreign market value; if as a result the foreign market value is higher than the price to the United States and a finding of dumping has been made, dumping duties would be assessed in an amount equal to the difference. Conversely, if the manufacturer paid advertising costs in the home market but not in the United States, the advertising expenses would be deducted from the home market price in determining foreign market value.

Other circumstances of sale would be selling costs, restrictions affecting value, commissions, differences in inland freight costs, and other items affecting the price of the merchandise in one market as compared with another.

Obviously, the term "differences in circumstances of sale" is not subject to precise definition, and there is no hard and fast rule for determining what such differences will be in a given case. It is clear, however, from the foregoing statements that this amendment was designed and intended to allow an adjustment in calculating foreign market value only for those factors and conditions which have a reasonably direct bearing on, or relationship to, the sales under consideration. Thus, although the cost factors might vary considerably in each case, depending upon the kind of merchandise involved, the sales and marketing practices, and other conditions, all would have one common element—a reasonably direct effect upon the sales under scrutiny.

Therefore, the adjustment allowed under section 202(b)(2) (19 U.S.C. 161(b)(2)) does not permit, as plaintiffs have done, the indiscriminate lumping together of all overhead expenses such as administrative, general financial management and selling expenses into a stewpot labeled "differences in circumstances of sale." Rather, it must be shown that each claimed expense had a reasonably direct effect upon the sales in the market under consideration.

Plaintiffs have manifestly failed to establish such relationship, relying instead upon the unsupported assertion that a portion of all overhead expenses, even administrative and financial, represent costs incurred "in connection with jack sales to Canadian customers that are

not applicable to sales to Bottorf [sic]" (exhibit 2, p. 3).[21] Absent a showing that the claimed items have a reasonably direct bearing on sales in the Canadian market not incurred in sales to the United States, no allowance can be made for them under section 202(b)(2) (19 U.S.C. 161(b)(2)).[22]

However, even if plaintiffs had shown that they were entitled to an allowance for some of these overhead expense items, they have nonetheless failed *in toto* to establish by substantial competent evidence the cost of these items for the period involved, thus foreclosing the court from finding foreign market values other than those found by the district director.

The proofs required to establish a value under the Antidumping Act must meet the same standards of competency and substantiality required in all cases involving valuation of merchandise for customs purposes. See section 210 of the Antidumping Act (19 U.S.C. 169). And on this aspect, a basic concept of all value determinations by the court is that they must be based upon proof of *actual* costs or prices—*not* estimates, approximations or averages. *Hamers Company* v. *United States*, 51 Cust. Ct. 407, 413, R.D. 10595 (1963). Thus, use of percentages in calculating expenses or profits will be rejected if they are not based upon *actual amounts* of expenses incurred or profits added. *Gerhard & Hey Co., Inc.* v. *United States*, 30 Cust. Ct. 580, 587–8, A.R.D. 13 (1953). Also, evidence of the *average* prices at which merchandise was sold may not be used as a basis for determining its statutory value. *United States* v. *International Graphite & Electrode Corp.*, 25 CCPA 74, 86–7, T.D. 49066 (1937).

Moreover, where a party is attempting to establish the general expenses and profits of one segment of a company's business activities,

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[21] When questioned as to his reasons for listing all overhead expenses as costs incurred in connection with jack sales, Spry observed (R. 148) that—

> [t]he ultimate end of J. C. Hallman is to sell a product. In that interpretation all expenses can be, I suppose, referred to selling the product.

However, Spry readily conceded that not all of the overhead expenses listed in exhibit 2 are considered selling expenses. R. 131–2. Thus, when preparing the *certified* annual financial statements for 1964 and 1965 for Hallman's shareholders (exhibits A and 5) Spry did not lump together all these overhead expenses as selling expenses; rather he listed them separately under the headings "financial," "general and administrative" and "selling"—which categorizations, he agreed, were made on the basis of general accounting principles. See R. 131. In other words, in preparing a certified report for Hallman's shareholders, Spry used an entirely different "accounting" method from that which he employed in the present case.

[22] Plaintiff's reliance upon *James C. Goff Co.* v. *United States, supra*, 58 CCPA 147, is misplaced. In that case, appellants had claimed that the appraisers erred in determining the foreign market value of the imported merchandise by failing to make sufficient allowances under section 202(b)(2) for certain expenses incurred in home market sales which allegedly were not present in sales to the United States. The appeals court affirmed the holdings of the trial judge and the Appellate Term of this court that plaintiffs had failed to establish through a competent qualified witness what the claimed costs actually were. At no time did the court reach or consider the question whether these cost items, if proved, were "differences in circumstances of sale" within the meaning of the statute.

the evidence offered must bear a direct relationship to the expenses and profits actually derived from that phase of the company's operations and not be base upon an arbitrary apportionment. *Judson Sheldon International Corporation* v. *United States*, 51 Cust. Ct. 374, R.D. 10586 (1963), *aff'd* 54 Cust. Ct. 773, A.R.D. 183 (1965).[23]

In *Hill Brown Corp.* v. *United States*, 54 CCPA 99, C.A.D. 917 (1967), appellant was engaged in three separate businesses, one of which involved the imported merchandise (decorative linens) for which it was claiming United States value as the proper basis of appraisement. In an attempt to establish the general expenses and profits to be deducted from the domestic price, appellant, which kept no separate records of the expenses and profits of its three businesses, determined the amount of overhead expenses for the linen importations by finding the ratio between the total linen and the total sales of all three businesses and applying that percentage to the total overhead expenses for all three operations. Appellant sought to justify this procedure as a "reasonable" way to apportion costs among a company's business operations to obtain "reasonable" allowances for the general expenses of the linen business.

The appeals court in *Hill Brown* rejected this argument and affirmed the Appellate Term's holding that appellant had not proven the general expenses and profits chargeable to the imported mer-

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[23] One of the issues involved in *Judson Sheldon*, in which plaintiff was claiming that the invoice prices of the merchandise represented the correct United States values, was the sufficiency of proof offered by plaintiff to establish the items of profit and general expenses which, under the statute, must be deducted to arrive at net United States values. In this connection, the trial court stated as follows (51 Cust. Ct. at 379) in language cited approvingly by the Appellate Term (54 Cust. Ct. at 777–8):

> * * * The court is not satisfied that the evidence as to "profit" and "general expenses" is sufficient to support plaintiff's claimed values. According to the evidence, no separate books were kept by the importer covering the profit and general expense items as applied to the imported merchandise alone. The testimony indicates that the only records kept by the company show entries of sales of all types of merchandise by the company; that, in order to determine the profit and general expenses to be assigned to the involved merchandise, it was necessary to assume that the same amount of profit proportionately was derived from the sale of the films and condensers as was derived from the sales of other merchandise; and that the general expenses relating to the handling of the condensers and films were exactly the same in proportion as the general expenses incurred in handling the other merchandise sold by the importer.
>
> * * * Plaintiff attempts to establish the general expenses for the involved merchandise by applying to such merchandise a percentage in relation to the percentage for general expenses covering all sales of merchandise made by plaintiff. This is unsatisfactory proof, since it may well be that it cost more to handle other types of merchandise, or less, as the case may be, than the outlay incurred for handling the imported merchandise. It is also very probable that the amount or margin of profit differs as applied to the various types of merchandise involved. The court is definitely of the opinion that the evidence offered does not meet the burden resting upon the plaintiff to establish the amount of profit and general expenses properly deductible for the ascertainment of the value of the involved merchandise.

chandise.[24] To the same effect see also *National Carloading Corp* v. *United States*, 60 CPA 54, C.A.D. 1080, 469 F. 2d 1398 (1972).

The evidentiary requirements spelled out in the foregoing cases for establishing the various statutory values are equally applicable here in establishing the claimed foreign market values for the imported jacks. However, the testimonial and documentary evidence adduced in this case, as previously recounted in detail, falls far short of meeting those standards. In no sense does this evidence reflect the actual expenses incurred by the jack division.[25]

From what has been said, the court must regard as totally without merit plaintiffs' assertion that, by virtue of Customs Regulations section 14.7 defining fair value—which is not here in issue in determining foreign market value—they need only estblish their claim under section 202(b)(2) (19 U.S.C. 161(b)(2)) by "reasonable evidence" (br. p. 27) and that they have sustained their burden by proving a "reasonable amount" (br. p. 23) for difference in circumstances of sale. *Hill Brown Corp* v. *United States*, *supra*, 54 CCPA 99; *Kobe Import Co.* v. *United States*, 43 CCPA 136, C.A.D. 620 (1956); *Brooks Paper Company* v. *United States*, *supra*, 40 CCPA 38.[26]

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[24] The court also cited (54 CCPA at 102–3) the following statement from the Appellate Term's principal opinion (55 Cust. Ct. 771, 776, A.R.D. 198 (1965)):

> * * * in computing the general expenses and, hence, profit, to be deducted from the domestic selling price of the merchandise, plaintiff has fallen into error. Its general expenses bear no relationship to the actual expenses incurred in its linen fabrics operations, which is the only phase of its business operations with which the court is concerned. The practice of apportioning operating expenses equally among all phases of a company's business operations, in lieu of the actual operating expenses incurred by a particular phase of business being inquired into, has not met with judicial approval. *Judson Sheldon International Corporation* v. *United States*, 51 Cust. Ct. 374, Reap. Dec. 10586, affirmed February 24, 1965, 54 Cust. Ct. 773, A.R.D. 183. Therefore, we agree fully with the trial court that "The record is barren of any evidence to show that in the processing and marketing of the merchandise at bar, operating costs were proportionately the same as the operating costs for conducting the other phases of plaintiff's business, however that proportion might be determined."

[25] The sole exception is the "Finished goods warehousing" expense which was based upon actual use of inventory space in 1965. Whether these figures also hold true for the first six months in 1966 is not indicated.

[26] In this connection, both parties and amicus curiae rely upon the *"fair value"* definition in section 14.7(b) of the Customs Regulations. This section, as approved on April 29, 1960 and published on May 6, 1960 (25 F.R. 3948) as TD 55118, sets forth the differences in circumstances of sale for which allowances could be made in the section determining *"fair value."* To the extent relevant here, the section provided as follows in language which remained unchanged through the period in issue (see T.D. 56315, 29 F.R. 16320 (1964)):

> (2) *Circumstances of sale.*—In comparing the purchase price or exporter's sales price, as the case may be, with the sales, or other criteria applicable, on which a determination of fair value is to be based, reasonable allowances will be made for bona fide differences in circumstances of sale if it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences.
>
> Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a reasonably direct relationship to the sales which are under consideration. Examples of differences in circum-

It is also noted that plaintiffs rely almost exclusively upon the testimony of Spry and upon exhibit 2, which was prepared by him, although he had no personal knowledge of the claimed overhead expenses and had to rely upon what Hallman management told him. It does not lend credence to plaintiffs' case that the witness Hallman, who supervised all of the company's activities and presumably knew more about its financial affairs than anyone else, was unable to testify as to the basis for allocating the various expenses among his company's production lines other than that they "tried to allocate what our company was doing and what the expense should be allocated to" (R. 62).

The court is compelled to conclude that the logistics employed by plaintiffs in constructing what can only be characterized as a bootstrap operation is palpably insufficient to establish their claim to an adjustment of 93 cents, or any other amount, for differences in circumstances of sale.[27]

As mentioned previously, plaintiffs further contend that irrespective of any allowance for differences in circumstances of sale, Bottorff purchased in sufficiently large quantities, as compared to the quantities purchased by Canadian customers, to justify the entire price differential between the two markets. But this contention must also fall. Section 202(b)(1) (19 U.S.C. 161(b)(1)) provides, as noted before, that a due allowance shall be made in determining foreign market value if it is established—

> * * * that the amount of any difference between the purchase price and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to—

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stances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising or other selling costs. Reasonable allowances will also generally be made for differences in commissions. Except in those instances where it is clearly established that the differences in circumstances of sale bear a reasonably direct relationship to the sales which are under consideration, allowances generally will not be made for differences in research and development costs, production costs, and advertising and other selling costs of a seller unless such costs are attributable to a later sale of merchandise by a purchaser; provided that reasonable allownces for selling expenses generally will be made in cases where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual selling expense incurred in the one market or the total amount of the commission allowed in such other market, whichever is less.

* * * * * * *

[27] Defendant's brief stresses certain discrepancies between the data contained in the invoices covered by the entries in issue and the figures set out in exhibit 2 relative to the monthly sales of jacks for the period in question. In view of the court's findings, it is unnecessary to deal with this aspect of plaintiffs' proofs.

> (1) the fact that the wholesale quantities, in which * * * [the] merchandise is sold * * * to the United States * * * are * * * greater than the wholesale quantities in which such * * * merchandise is sold * * * in the * * * country of exportation * * *

On this phase, the record discloses that a 47% discount from the Hallman price list was offered to all purchasers of 100 or more units, and that this discount was allowed by the district director in determining the foreign market values. However, there is not a scintilla of evidence in the record (Spry's speculation to the contrary notwithstanding) that Hallman offered additional discounts for purchase of larger quantities or that the lower prices charged Bottorff were "due to" his volume purchases.

It is also worthy of note on this aspect that plaintiffs relied solely on the conjectures of a witness who was not familiar with the price structure of Hallman's merchandise, whereas the witness Hallman, the company's president, who would be most knowledgeable in this area, was entirely silent on this question. Indeed, upon reflecting on the trial proceedings, it would appear that plaintiffs' counsel carefully refrained from questioning Hallman with respect to his company's discount policy.

V

Section 201(b) of the Antidumping Act (19 U.S.C. 160(b)) provides that whenever the Secretary of the Treasury has reason to believe, in the case of any imported merchandise, that the purchase price or exporter's sales price is less, or likely to be less, than the foreign market value, he shall—

> * * * forthwith publish notice of that fact in the Federal Register and shall authorize, under such regulations as he may prescribe, the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping has been raised by or presented to him * * *.

Plaintiffs contend that sections 14.6(e) and 14.9(a) of the Customs Regulations (19 CFR 14.6(e) and 14.9(a) (1965 ed.)) then in effect (which were promulgated pursuant to section 201(b) (19 U.S.C. 160 (b))) precluded appraising officers from withholding appraisements of the steel jack entries until the publication on September 9, 1965 of the supplementary withholding of appraisement notice advising that purchase price was the appropriate basis of comparison for fair value purposes.

These sections of the regulations provide, in pertinent part, as follows:

> 14.6(e) If the Commissioner determines * * * that there are reasonable grounds to believe or suspect that any merchandise is being, or is likely to be, sold at less than its foreign market value * * * he shall publish notice of that fact in the Federal Register, furnishing an adequate description of the merchandise, the name of each country of exportation, and the date of the receipt of the information in proper form, and *shall advise all appraisers of his action. This notice may be referred to as the "Withholding of Appraisement Notice."* * * * The notice shall * * * specify whether the appropriate basis of comparison for fair value purposes is purchase price or exporter's sales price *if sufficient information is available to so state;* otherwise a supplementary notice will be published in the Federal Register as soon as possible which will specify which of such prices is the appropriate basis of comparison for fair value purposes. Upon receipt of such advice, the appraisers shall proceed to withhold appraisement in accordance with the pertinent provisions of section 14.9 [Emphasis added.]
>
> 14.9(a) Upon receipt of advice from the Commissioner of Customs pursuant to section 14.6(e), if the Commissioner's "Withholding of Appraisement Notice" shall specify that the proper basis of comparison for fair value purposes is exporter's sales price *or if that notice does not specify the appropriate basis of comparison for fair value purposes, each appraiser shall withhold appraisement as to such merchandise entered, or withdrawn from warehouse, for consumption, on any date after the 120th day before the question of dumping was raised by or presented to the Secretary of the Treasury or his delegate.* If the Commissioner's "Withholding of Appraisement Notice," including any supplementary notice, shall specify that the proper basis of comparison for fair value purposes is purchase price, the appraiser shall withhold appraisement as to such merchandise entered, or withdrawn from warehouse, for consumption, after the date of publication of the "Withholding of Appraisement Notice." * * * [Emphasis added.]

Construing these sections in pari materia, the only reasonable interpretation to be placed upon them is that the apprasiers were directed to withhold appraisements upon receipt of the original "Withholding of Appraisement Notice," and that the phrase "Upon receipt of such advice" in section 14.6(e), like the phrase "Upon receipt of advice" in section 14.9(a), refers to the original, not to the supplementary, notice. Any other construction would render superfluous and meaningless the phrases "and shall advise all appraisers of his action" in section 14.6(e) and "or if that notice does not specify the appropriate basis of comparison for fair value purposes" in section 14.9(a).

This interpretation also comports with the provisions contained in sections 201(b) and 202(a) of the Antidumping Act (19 U.S.C. 160(b) and 161(a)), *supra*.[28]

It is to be added that the question of dumping was presented to the Secretary by means of information received on April 13, 1965. See 31 F.R. 100. This being the case, appraisements could properly be withheld as to merchandise entered after December 13, 1964 (the 120th day before the question was raised). Since all the entries involved here were made after that date, it follows that all the merchandise in question was subject to appraisement for dumping duty purposes.

VI

Finally, plaintiffs assert that "[t]he failure of the Treasury Department to adjust the foreign market value in accordance with [section 202 (19 U.S.C. 161)] renders his determination of sales at less than fair value invalid" (br. p. 37).

In so arguing, plaintiffs appear to have confused the concept of sales at less than fair value with foreign market value. Section 201 of the Antidumping Act (19 U.S.C. 160) provides for assessment of dumping duties whenever (a) the Secretary of the Treasury determines that a *class or kind* of foreign merchandise is being, or is likely to be sold, in the United States at a price less than its fair value and (b) the Tariff Commission determines that an industry in the United States is being or is likely to be injured, or is prevented from being established by reason of the importation of such merchandise into this country. (For the purposes of the Act "fair value," as previously discussed, is defined in section 14.7 of the Customs Regulations (19 CFR 14.7).) Thus, the determinations of the Secretary and the Tariff Commission are concerned with the *class or kind* of merchandise involved, not a particular importation.

The dumping duties, however, are measured by the difference between (1) the "purchase price" (or "exporter's sales price") of the particular importation (as defined in sections 203 and 204 (19 U.S.C. 162 and 163)) and (2) the "foreign market value" (as defined in section 205 (19 U.S.C. 164) with the adjustments provided for in section 202(b) (19 U.S.C. 161(b)). Accordingly, whether or not the district director erred in determining the foreign market value of any of the importations involved here by not making sufficient allowance for the differences in the usual wholesale quantities or other differences in

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[28] Whether the provision in section 201(b) (19 U.S.C. 160(b)) that the Secretary "shall authorize" the withholding of appraisement reports is mandatory or only "permissive,' as defendant asserts, is not before the court for consideration. On this point, however, see S. Rep. No. 1619, *supra*, note 20, at 3501.

circumstances of sale under section 202(b) (19 U.S.C. 161(b)), has no bearing on the Secretary's determination under section 201 (19 U.S.C. 160) as to sales of the *class or kind* of merchandise at less than fair value and a finding of error in foreign market value can in no wise affect his determination therein.

Even more important, it is settled that in enacting the Antidumping Act, Congress delegated to the Secretary broad discretionary authority. And in this respect, the court is limited to determining whether the Secretary or his delegate acted within the scope of his delegated authority and correctly construed the pertinent statutory language. The court may not go further and weigh the evidence or review the conclusions the Secretary drew therefrom. Thus, in *Kleberg & Co. (Inc.)* v. *United States*, 21 CCPA 110, 115, T.D. 46446 (1933), our court of appeals stated:

> It is equally well established by the authorities that if the Secretary of the Treasury has proceeded in the method prescribed by the Congress, we may not judicially inquire into the correctness of his conclusions. The constitutionality of the law under which he proceeds having been once determined, then the judicial power extends only to a correction of his failure to proceed according to and within the law. *United States* v. *Sears, Roebuck & Co., supra; Clarke* v. *United States*, 17 CCPA (Customs) 420, T.D. 43866; *United States* v. *Tower & Sons*, 14 Ct. Cust. Appls. 421, T.D. 42058; *United States* v. *Central Vermont Railway Co.*, 17 CCPA (Customs) 166, T.D. 43474.
>
> This being the state of the law, we are not at liberty here to go into an investigation as to whether the facts shown on the trial below justified the issuance of the order complained of. * * *

See also *Imbert Imports, Inc.* v. *United States*, 60 CCPA 123, C.A.D. 1094, 475 F. 2d 1189 (1973); *City Lumber Co.* v. *United States*, 59 CCPA 89, C.A.D. 1045, 457 F. 2d 991 (1972); *United States* v. *Elof Hansson, Inc.*, 48 CCPA 91, C.A.D. 771, 296 F. 2d 779 (1960), *cert. den.* 368 U.S. 899 (1961).

VII

In summary, plaintiffs have failed to establish (i) that the foreign market values found by the district director for the importations herein are erroneous; (ii) that the merchandise entered prior to September 9, 1965 was not subject to dumping appraisement; or (iii) that the Assistant Secretary of the Treasury erred in finding sales at less than fair value.

Judgment will be entered accordingly.

(C.D. 4545)

KEYSTONE CASING SUPPLY, INC. *v.* UNITED STATES

Netting, in the piece

The imported merchandise consists of fabric imported in 50-yard rolls from which random small pieces of various lengths are cut for use in wrapping rolled roast beef and salami type meat products. Defendant does not purport to dispute that the imported fabric is netting made on a knitting machine. The netting is unquestionably "in the piece."

Classification in this case involves the question of how the imported merchandise, which defendant's pleadings admit consists of textile fabrics, should be classified in terms of superior headings in schedule 3, part 4, subpart B, for netting, in the piece, made on a knitting machine, in competition with the superior heading in schedule 3, part 7, subpart B, for articles not specially provided for, of textile materials.

Held. Since schedule 3, part 7, subpart B, only "covers articles, of textile materials, not covered elsewhere in the tariff schedules," and the rolls of fabric provenly consist of netting, in the piece, made on a knitting machine, the said rolls consist of fabric, of textile material, specially provided for as netting, in the piece, made on a knitting machine, dutiable under TSUS item 352.80, and should not have been classified as though they were rolls, not specially provided for, of textile materials, dutiable under TSUS item 386.05.

Court Nos. 67/34502, etc.

Port of Pittsburgh

[Judgment for plaintiff.]

(Decided May 30, 1974)

Allerton deC. Tompkins; Lloyd E. Engle, Jr., associate counsel; for the plaintiff.

Carla A. Hills, Assistant Attorney General (*Steven P. Florsheim* and *Saul Davis*, trial attorneys), for the defendant.

LANDIS, Judge: These six cases, consolidated for trial, involve 50-yard rolls of tubular textile fabric imported from Italy [1] which fabric after importation was cut into small random pieces and used to wrap rolled roast beef and salami type meat products.

The merchandise was classified by customs under TSUS (Tariff Schedules of the United States) item 386.05 as articles not specially provided for, of textile materials.[2]

[1] Exhibits 1 through 30 are representative fabric samples cut from the imported rolls of the kind used with cooked meats, i.e., rolled roast beef. Exhibit 32 is a list of the contested entries involving fabric used to wrap salami type meats.

[2] Dutiable at 50 per centum ad valorem as net articles, whether or not ornamented.

Plaintiff in its complaint alleges the merchandise should have been classified under TSUS item 352.80 as netting, in the piece, made on a knitting machine.[3]

Defendant has filed answer admitting that the rolls of the fabric are netting, but denying that they are in the piece made on a knitting machine.

Schedule 3, part 4 and part 7, provide for the above classifications in pertinent context as follows:

Classified:

SCHEDULE 3. – TEXTILE FIBERS AND TEXTILE PRODUCTS

Part 7. – Miscellaneous Textile Products; Rags and Scrap Cordage

Subpart B. – Textile Articles Not Specially Provided For

Subpart B headnote:

1. This subpart covers articles, of textile materials, not covered elsewhere in the tariff schedules.

	Articles not specially provided for, of textile materials:	
386.05	Lace or net articles, whether or not ornamented, and other articles ornamented ----------	50% ad val.

Claimed:

SCHEDULE 3. – TEXTILE FIBERS AND TEXTILE PRODUCTS

Part 4. – Fabrics of Special Construction or For Special Purposes; Articles of Wadding or Felt; Fish Nets; Machine Clothing

Subpart B. – Lace, Netting, and Ornamented Fabrics

Subpart B headnotes:

1. This subpart covers only (a) textile fabrics in the piece, of any width, including edgings, insertings, galloons, flouncings, and all-overs, and (b) textile motifs. Fabrics described in part 3, part 4A, or part 4C of this schedule are covered by item 333.50 if ornamented.

* * * * * * *

[3] Dutiable at 24 per centum ad valorem.

	Netting, in the piece, made on a lace, net, or knitting machine, whether or not ornamented:	
	* * * * * * *	
	Not ornamented:	
* * *	Quilling	* * *
	Other:	
352.40	Made on a Mechlin (or Malines) net machine	* * *
352.50	Made on a bobbinet machine, of cotton, and having not over 224 holes per square inch	* * *
352.80	Other	24% ad val.

At the trial, two witnesses testified for plaintiff. There were no witnesses for defendant.[4] The material facts testified to of record and next summarized are not in dispute.

The fabric imported in rolls of 50 yards is a cotton elastic tubular netting made on a knitting machine other than a Mechlin or bobbinet machine. Some of the fabric was produced in tubular form on a double needle bar knitting machine. Some was produced on a single needle bar knitting machine and made into tubular form by folding the fabric and closing it on another machine. The rolls of fabric are cut into random lengths after importation but show no lines of demarcation for cutting. The fabric is sold and advertised as "Jet-Net" or "Net-Tye."

At the times of importation, the fabric was sold exclusively to the industry engaged in the business of selling meat products. The importations include a fabric made to withstand the heat of an oven which is used to wrap rolled roast beef products that are ordinarily hand-tied with a cord or string. Also included is fabric used to wrap salami type meat products. There is nothing that physically identifies the fabric rolls as a meat wrap and one witness opined that it could be used to wrap cheese or used in other applications "depending upon the imagination of the user." Users cut the fabric from the rolls in random length determined by the size of the meat product it is to wrap. There are machines available to facilitate stuffing the meat into the tubular fabric.

[4] Defendant introduced three documents (correspondence between the attorney for plaintiff and the Bureau of Customs) into evidence (exhibits A, B, and C).

Defendant does not purport to dispute that the testimony establishes that the imported fabric is netting made on a knitting machine. The netting [5] is also unquestionably "in the piece."

Both sides have filed briefs.[6] Plaintiff assesses that it has factually proved that the imported rolls of textile fabric consist of netting, in the piece, made on a knitting machine, dutiable under TSUS item 352.80. Defendant, relying on the factual testimony that the imported fabric was exclusively used to wrap meat products, contends that the fabric cannot be classified as netting, in the piece, because in the manner of its use the fabric is not, in the tariff sense, a fabric "material" but rather a net "article," dutiable under TSUS item 386.05.

The difficulty with defendant's contention is that its argument of "material" versus "article" [7] is not germane to the issue raised by the competing superior tariff headings in this case. Classification in this case involves the question of how the imported merchandise, which defendant's pleadings admit consists of textile fabrics, should be classified in terms of the superior heading in schedule 3, part 4, subpart B, for netting, in the piece, made on a knitting machine, in competition with the superior heading in schedule 3, part 7, subpart B, for articles not specially provided for, of textile materials. With respect to that competition it is only necessary to observe that the superior heading for articles not specially provided for, of textile materials, is prefaced by a headnote which states that the subpart in which the heading appears (schedule 3, part 7, subpart B) only "covers articles, of textile materials, not covered elsewhere in the tariff schedules." Netting, in the piece, made on a knitting machine, which is covered in schedule 3, part 4, subpart B, is obviously not covered by schedule 3, part 7, subpart B. The rolls of fabric imported in this case provenly consist of netting, in the piece, made on a knitting machine. The said rolls, therefore, consist of fabric, of textile material, specially provided for by item 352.80 as netting, in the piece, and should not have been classified as though they were rolls, not specially provided for, of textile materials, under TSUS item 386.05.

The claim under TSUS item 352.80 is sustained.

Judgment will enter accordingly.

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[5] "Net sometimes used as a synomyn for netting, is, correctly, a particular length of netting." Summary of Tariff Information (1929), schedule 14, page 2026; Summary of Tariff Information (1948), volume 15, part 5, page 18. Cf. *R. P. Oldham Company* v. *United States*, 41 CCPA 53, C.A.D. 528 (1953).

[6] Plaintiff also filed a reply brief and defendant a surreply brief.

[7] Cf. *D. N. & E. Walter & Co., et al.* v. *United States*, 44 CCPA 144, C.A.D. 652 (1957); compare this contention with defendant's contention in *Sandvik Steel, Inc.* v. *United States*, 66 Cust. Ct. 12, C.D. 4161 (1971).

(C.D. 4546)

AMERICAN CUSTOMS BROKERAGE CO., INC. v. UNITED STATES A/C ASTRAL CORP.

Seagoing vessel

A yacht, the "MS Astral," built in Germany, registered and documented under the laws of the Netherlands Antilles, and brought into the United States by a resident thereof was improperly classified under item 696.10 of the tariff schedules as a yacht or pleasure boat valued over $15,000, and assessed with duty at the rate of 6 per centum ad valorem. The record established that the "MS Astral" was not an "importation" for tariff purposes.

IMPORTATION—WHAT CONSTITUTES IMPORTATION FOR TARIFF PURPOSES

Unless intended otherwise by Congress, the term "importation" has been held to mean the bringing of goods within the jurisdictional limits of the United States with *intent to unlade*. See *The Sherwin-Williams Co.* v. *United States*, 38 CCPA 13, C.A.D. 432 (1950).

IMPORTATION—WHAT CONSTITUTES IMPORTATION AS TO SEAGOING VESSELS

For seagoing vessels or yachts entering the United States under their own power, the general definition being inapplicable, it is essential that the vessel be brought into the United States "permanently," in order for it to be considered imported merchandise. The question of "permanence" must be determined on the basis of intent. See *Estate of Lev H. Prichard* v. *United States*, 43 CCPA 85, C.A.D. 612 (1956).

INTENTION—DETERMINATION

Intention is a state of mind usually evidenced by conduct or statements and "almost always manifold and complex." See *Pollock, Jurisprudence* 155 (1929); *United States* v. *Stoehr*, 100 F. Supp. 143 (M.D. Pa. 1951); *Jones* v. *State*, 192 So. 2d 285 (Fla. App. 1966); *Johnson* v. *Commonwealth*, 163 S.E. 2d 570, 209 Va. 291 (1968); *Detroit Trust Co.* v. *Hartwick*, 270 N.W. 249, 278 Mich. 139 (1936).

The record of the case at bar established that the "MS Astral" was brought to the United States only temporarily for repairs, and as part of a general "shakedown" cruise or test run. The intention was to return the "MS Astral" to the Mediterranean; its extended duration in this country was unanticipated and caused by the need for extensive repairs some of which could only be done in the United States. As a legal consequence of the intent not to bring the "MS Astral" permanently into the United States, it was not, in customs law, an "importation." Its occasional use for pleasure did not change the essential nature of the "shakedown" cruise as a test run.

Court No. 72–2–00308

Port of Honolulu

[Judgment for plaintiff.]

(Decided May 30, 1974)

Glad, Tuttle & White (*Edward N. Glad* of counsel) for the plaintiff.
Carla A. Hills, Assistant Attorney General (*James Caffentzis*, trial attorney), for the defendant.

RE, Judge: The question presented in this case pertains to the dutiable status of a yacht under the Tariff Schedules of the United States (TSUS). The yacht, the "MS Astral," is registered and documented under the laws of the Netherlands Antilles, and was brought into the United States by a resident of this country.

The Astral first entered the territorial waters of the United States at San Diego harbor on or about November 23, 1970. On November 24, 1970, the yacht's master, Captain Perdue, pursuant to 46 U.S.C. 104 and section 4.94 of the Customs Regulations, applied for and obtained a cruising license to cruise in and around the waters of San Diego, Los Angeles, San Francisco, Seattle and Honolulu until May 24, 1971. In March 1971, the Astral departed from California for Hawaii, where a 6 months' extension of the cruising permit was issued on May 20, 1971.

However, at the insistence of customs officials, an appraisement entry of the yacht was made on June 30, 1971 at Honolulu, Hawaii. The Astral was thereupon classified under TSUS item 696.10, as modified by T.D. 68–9, as a yacht or pleasure boat valued over $15,000, owned by a resident of the United States or brought into the United States for sale or charter to a resident thereof. Hence, it was assessed with duty at the rate of 6 per centum ad valorem.

Plaintiff contends that the yacht was not subject to entry under the customs laws and was therefore nondutiable under either of the following grounds: (1) since there was no intent to bring the Astral into the United States permanently, it was a nonimportation, or (2) since it was owned by a nonresident, it was not imported for charter or sale to a resident of the United States.

The pertinent statutory provisions read as follows:

Tariff Schedules of the United States

General Headnotes and Rules of Interpretation

"1. Tariff Treatment of Imported Articles. All articles imported into the customs territory of the United States from outside thereof are sub-

ject to duty or exempt therefrom as prescribed in general headnote 3.

* * * * * * *

3. Rates of Duty. The rates of duty in the 'Rates of Duty' columns numbered 1 and 2 of the schedules apply to articles imported into the customs territory of the United States as hereinafter provided in this headnote:

* * * * * * *

5. Intangibles. For the purposes of headnote 1—

* * * * * * *

(e) vessels which are not 'yachts or pleasure boats' within the purview of subpart D, page 6, of schedule 6, are not articles subject to the provisions of these schedules."

Schedule 6, part 6, subpart D:

"Subpart D headnote:

1. This subpart does not cover—

(i) yachts or pleasure boats provided for in items 696.05–.10 if in use or intended to be used in trade or commerce, or if brought into the United States by non-residents thereof for their own use in pleasure cruising; or

(ii) vessels which are not yachts or pleasure boats (see general headnote 5(e)).

	Yachts or pleasure boats, regardless of length or tonnage, whether motor, sail, or stream propelled, owned by a resident of the United States or brought into the United States for sale or charter to a resident thereof, whether or not such yachts or boats are brought into the United States under their own power; and parts thereof:	
	Yachts or pleasure boats:	
	* * * * * * *	
696.10	Valued over $15,000 each-----	6% ad val."

46 U.S.C. 104:

"Reciprocal exemption of foreign yachts from charges and tonnage taxes; licenses.

> Whenever it shall be made to appear to the satisfaction of the President of the United States that yachts used and employed exclusively as pleasure vessels and belonging to any resident of the United States are allowed to arrive at and depart from any foreign port and to cruise in the waters of such port without entering or clearing at the customhouse thereof and without the payment of any charges for entering or clearing, dues, duty per ton, tonnage taxes or charges for cruising licenses, the Commissioner of Customs may authorize and direct the customs authorities at the various ports of entry of the United States to allow yachts from such foreign port used and employed exclusively as pleasure vessels to arrive at and depart from any port of the United States and to cruise in waters of the United States without the payment of any charges for entering or clearing, dues, duty per ton, or tonnage taxes, but the Commissioner of Customs may, in his discretion, direct that such foreign yachts shall be required to obtain licenses to cruise, in a form prescribed by him, before they shall be allowed under the provisions of this section to cruise in waters of the United States. Such licenses shall be issued without cost to such yachts and shall prescribe such limitations as to length of time, direction, and place of cruising and action, and such other particulars as the Commission of Customs may deem proper."

At the trial, two witnesses testified for plaintiff: Mr. Cornelius Christian Vanderstar, a naturalized citizen of the United States and resident of Newport Beach, California, and Harry William Perdue, a retired Coast Guard lieutenant commander, who was hired as master of the Astral from approximately October 10, 1970 until May 30, 1971.

Mr. Vanderstar testified that the Astral is a 98-foot steel hull, ketch rigged motor sailer, which was built for him by a West German shipyard. He stated that he paid approximately $650,000 for the yacht upon its completion in July 1970.

Prior thereto, in April 1970, Mr. Vanderstar organized the Astral Corporation in Curaçao, Netherlands Antilles, through two Dutch companies and their representatives. The purpose of the Astral Corporation, as stated in its articles of incorporation, was the "operation of one or more seagoing yachts and every thing connected therewith in the broadest sense." After forming the company, the incorporators sold all of their shares to Mr. Vanderstar, who thereby became the sole stockholder.

In July 1970, before the yacht was completed, the Astral Corporation purchased the Astral from Mr. Vanderstar, who loaned the corporation approximately $688,000 so that it could buy the yacht from him. The yacht was subsequently registered at Curaçao.

Commencing with the last half of 1970, and in 1971 and 1972, Mr. Vanderstar personally chartered the yacht for an annual fee of

$140,000. Part of the chartering fee was to pay the boat's operating expenses, such as fuel, food, wages, upkeep and repairs, all of which were personally paid by Vanderstar. The balance was applied toward the repayment of the loan.

In July 1970, the Astral sailed from West Germany to Holland on the start of its "shakedown" cruise. A "shakedown" cruise is intended to test a new ship under operating conditions, and to familiarize the crew. As explained by the witness:

> "Every new boat needs a certain amount of time to sort of see how everything operates at sea, whether there were any bugs in equipment or, if changes had to be made, to get everything operating properly."

Having owned only much smaller yachts, Mr. Vanderstar did not know the duration of a "shakedown" cruise for a yacht the size of the Astral. Furthermore, the Astral was already encountering some problems in the electrical system when he acquired it in Germany, and the builder sent an engineer with him to Holland to correct some of the difficulties.

The yacht proceeded from Holland to England and thence to the Canary Islands, taking about one and a half months. It then proceeded to Curaçao, taking another one and a half to two months. It was delayed about four weeks in Curaçao because the entire air conditioning system was inoperative and a number of motors had to be rewired and changed. Finally, it went through the Panama Canal up the Mexican coast to Acapulco, where one of the diesel generators was completely overhauled and new pistons and cylinder linings were installed. The motor, however, still did not work properly. Although the generators were under warranty by the General Motors Corporation, that company did not have a representative in Acapulco.

Mr. Vanderstar then had the Astral proceed north to San Diego to "obtain a cruising permit in order to spend some time in the United States and, among other things, to have some repairs made to the boat."

The yacht remained two nights in San Diego, and then proceeded to Mr. Vanderstar's residence at Newport Beach where it was docked. Repairs were made at Newport Beach, and at the Lido Shipyard, by the crew, the shipyard, and representatives from various companies. The repairs consisted of a complete overhaul of both diesel generators, installation of new through-hull fittings to relieve the extensive exhaust pressure in the exhaust system, and installation of new piping and valves to lead the water overboard rather than through the exhaust. New piping valves and overboard fittings were also installed for the main engines to relieve some of the exhaust pressure out of the ex-

haust system. Additionally, in view of certain difficulties, new water filters were put into the diesel system in order to be able to observe the water in the systems.

Other repairs also had to be made. The rectangular port holes were rebuilt because they were leaking water inside instead of outside, an air-conditioning compressor was replaced as it had a broken shaft, and various repairs were made on the refrigerator and freezer system. The a.c. inverter, which never worked properly despite repairs in three ports, had to be taken completely apart. Because of a design defect, the parts were shipped back to the Chicago manufacturer where they were redesigned, rebuilt, returned to Los Angeles and reinstalled.

The outside of the hull had to be completely stripped of all the paint and putty-finish put on in Germany because the paint was peeling away and causing corrosion of the hull. The outside of the hull had to be completely refinished by the Lido Shipyard, a process which took almost two months, required the yacht to be drydocked, and cost Mr. Vanderstar in excess of $16,000.

A leaking hot-water tank that had been unsuccessfully welded in Mexico was rewelded in Los Angeles. This same tank later blew out on the cruise to Hawaii, and was repaired there at a cost of $400. Also, the toilets were replaced, the captain's cabin was rebuilt to add an extra bunk to carry a crew of six instead of five, carpeting and upholstery were replaced, and a VHF radio was installed. The cost of the work done on the hull at Lido Shipyard, together with the cost of the repairs done in Newport Beach, exceeded $30,000.

The yacht was moored at Mr. Vanderstar's residence from November 1970 to January 1971, and again for a few weeks in March. In March it made a few trial runs to Catalina Island and outside the harbor in order to test the motors, and to have the personnel from General Motors Diesel Works adjust the engines.

The yacht left California in late March of 1971, and arrived at Hawaii on Easter Sunday. The purpose of the Hawaiian trip was to "try out all the various items that we had on board and to see how everything was working and part of the general shakedown cruise." The yacht was used for cruising in Hawaii "running from island to island." However, although there were some guests on board, they were "still trying out the boat in various ways and still had some breakdowns in Hawaii." According to Mr. Vanderstar, "the repairs took practically all the time that the boat was here" [in the United States].

The Astral left Hawaii in June 1971, arriving in Tahiti around August. From there, it went back through the Panama Canal to the Carib-

bean, crossed the Atlantic reaching northern Europe in June of 1972, and proceeded to the Mediterranean. The last repairs were made in August 1972 at the West German shipyard where the Astral was built.

Mr. Vanderstar did not stay with the Astral during the entire cruise. He remained on the yacht until it arrived at the Canaries, disembarked, and then rejoined it for certain periods of time at various ports. When on board he was accompanied at times by his wife, friends, and by a cameraman on the trip from England to Curaçao.

He testified that he never intended to bring the yacht into the territorial limits of the United States as an importation; that he intended "to stay a maximum of two months, and it dragged on and on because of the larger repairs that had to be made," and that it "would have been impossible" to have the repairs done elsewhere than in the United States because there were "no services available on these items with the degree of malfunction that existed in them." He had planned to "make an extended cruise while shaking down the boat" and to have the yacht end up in the Mediterranean where it would be made ready for charter purposes.

The Astral has two gangplanks, a stern gangway that is used for Mediterranean mooring, and another, which is used in the United States, for exiting from the side. The vessel is also equipped for 220 volt a.c. short power, the current used in Europe, and for 110 a.c. power, which is used in this country. It has a shallow draft and a retractable center board so that it can be sailed in the waters of the Bahamas and Caribbean. It is equipped for long cruising, having a large water and fuel capacity, large refrigeration and freezer storage units, and a fresh water making unit.

Captain Perdue testified that when he was interviewed for the job as master, Mr. Vanderstar told him that he intended to get the boat in shape; that he was having problems with it and the crew; that it was breaking down; and that he wanted to take it on a shakedown cruise. Mr. Vanderstar also told him that he planned to go from "the Caribbean to Mexico, for awhile the United States, down over to Tahiti, back to the Caribbean, and then to Europe." According to Captain Perdue, all of his discussions with Mr. Vanderstar indicated that the vessel "would never come to the United States to stay, but only for a visit, as any yacht would visit any place in the world."

When Captain Perdue came on board in Curaçao, the air-conditioning system was undergoing extensive repairs and some work was being done on the engines. There were air-conditioning problems at every stop.

During its entire stay in the United States, the yacht was always under repair except for a few days. Captain Perdue stated that he took

it out about three times when it was at Newport Beach, either as a work trip or to test it. The Astral also had breakdowns on the way to Hawaii. Furthermore, some of the repairs made in Newport Beach did not hold up and had to be done over. He observed that a shakedown cruise for any vessel can last for a long period of time. In the case of the Astral, the main problems were the quality of the technical work on it and getting service on the warranties.

Upon entering the territorial waters of the United States, Captain Perdue first called at San Diego where he notified customs, immigration and public health officials. He had applied for the cruising permits in San Diego and Hawaii because the Astral, in his words,

> "was a foreign vessel entering the United States and it was going to stay for awhile. It was a yacht, and the law requires it."

In having classified the Astral under item 696.10 of the tariff schedules, and having assessed duty thereunder the appropriate customs officials must have found that: (1) it was "imported into the customs territory of the United States" within the meaning of TSUS general headnote 1; and (2) that it was a yacht or pleasure boat owned by a resident of the United States or brought into the United States for sale or charter to a resident thereof. Those determinations are endowed with a statutory presumption of correctness. 28 U.S.C. 2635(a) (1970). See *Sanji Kobata et al.* v. *United States*, 326 F. Supp. 1397, 1399, 66 Cust. Ct. 341, 344, C.D. 4213 (1971).

Accordingly, in order to prevail in this litigation it is plaintiff's burden to establish either that the Astral was not "imported" into the United States, in the tariff sense, or, that even if it were an "importation," it did not come within the ambit of item 696.10, and was therefore exempt from duty by virtue of TSUS general headnote 5.

Plaintiff challenges the action of the customs officials on both grounds, contending that the boat was not "imported into the customs territory of the United States," and that it was owned by a nonresident corporation which did not bring it into the United States for sale or charter to anyone.

Based upon all of the evidence of record, and particularly the testimony of plaintiff's witnesses, it is the determination of the court that plaintiff has successfully borne its burden of proof in establishing that the Astral was not an "importation" for tariff purposes, and was, therefore, improperly assessed for duty. Hence, it is unnecessary to reach the question raised as to the appropriateness of its classification under item 696.10 of the tariff schedules.

What constitutes an "importation" under the tariff laws of the United States has already been the subject of judicial consideration.

Unless it clearly appears that Congress intended otherwise, the term "importation" has been held to mean the bringing of goods within the jurisdictional limits of the United States with intent to unlade. *The Sherwin-Williams Co.* v. *United States*, 38 CCPA 13, C.A.D. 432 (1950); *Porto Rico Brokerage Co., Inc., et al.* v. *United States*, 23 CCPA 16, 76 F.2d 605, T.D. 47672 (1935), *aff'd on rehearing*, 23 CCPA 259, 80 F.2d 521, T.D. 48111 (1936); *United States* v. *Field & Co.*, 14 Ct. Cust. Appls. 406, T.D. 42052 (1927); *United States* v. *Estate of Boshell*, 14 Ct. Cust. Appls. 273, T.D. 41884 (1926).

The foregoing definition, of course, cannot be applied literally in the case of a seagoing vessel or yacht entering the United States under its own power. As stated by the Court of Customs and Patent Appeals, in considering the applicability of paragraph 370 of the Tariff Act of 1930,[1] the predecessor tariff provision to item 696.10:

> "* * * it is evident * * * that such an entry may amount to an importation under that paragraph. It is therefore necessary to determine under what circumstances the act of bringing a yacht into the United States under its own power constitutes an importation.
>
> "The appellant cites a ruling of the Treasury Department, reported in 33 T.D. 292, T.D. 37376 as giving the proper definition of importation of a vessel. That ruling states that:
>
> 'If coming into this country temporarily as carriers of passengers or merchandise, they are not subject to customs entry or the payment of duty, but if brought into the United States permanently they are to be considered and treated as imported merchandise.'
>
> "Assuming that definition to be correct, it is evident that the word 'permanently,' in the case of a seagoing vessel would not preclude the use of the vessel for cruises abroad after its importation. It is also evident that the question as to whether a vessel is brought into the United States 'permanently' must be determined on the basis of intent." *Estate of Lev H. Prichard* v. *United States*, 43 CCPA 85, 87–88, C.A.D. 612 (1956).

As gleaned from the *Prichard* case, a determination as to whether a yacht is "imported," at least for purposes of paragraph 370, turns ultimately on the question of intent.

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[1] Par. 370 provided as follows:

"Airplanes, hydroplanes, motor boats, and parts of the foregoing 30 per centum ad valorem. The term 'motor boat,' when used in this Act, includes a yacht or pleasure boat, regardless of length or tonnage, whether sail, steam, or motor propelled, owned by a resident of the United States or brought into the United States for sale or charter to a resident thereof, whether or not such yacht or boat is brought into the United States under its own power, but does not include a yacht or boat used or intended to be used in trade or commerce, nor a yacht or boat built, or for the building of which a contract was entered into, prior to December 1, 1927."

The legislative history of item 696.10 of the tariff schedules, as contained in the *Tariff Classification Study*, November 15, 1960, indicates that it was designed to carry over the provisions of paragraph 370 into the revised tariff schedules (TSUS).[2] Hence, the reasoning of the *Prichard case*, with which the court is in full accord, may serve as a guide in the decision of the present case.

Intent is a state of mind which is difficult of precise proof and can only be inferred from acts and circumstances. See *United States* v. *Stoehr*, 100 F. Supp. 143 (M.D. Pa. 1951); *Jones V. State*, 192 So.2d 285 (Fla. App. 1966). A person's intent is usually evidenced by his conduct or statements. See *Johnson* v. *Commonwealth*, 163 S.E.2d 570, 209 Va. 291 (1968); *Detroit Trust Co.* v. *Hartwick*, 270 N.W. 249, 278 Mich. 139 (1936). Expressions of intent, however, may be used for self-serving purposes. Hence, the court must scrutinize them carefully, together with the conduct of the person making them, and the external circumstances which might tend to confirm or refute them.

It is consequently necessary to determine the intent of Mr. Vanderstar in causing the Astral to enter American waters. It has been noted that "intention is almost always manifold and complex." *Pollock*, *Jurisprudence* 155 (1929). This requires an examination of Mr. Vanderstar's purpose or design. By any standard of proof, his testimony, together with that of Captain Perdue, has convinced the court that his intent was not to bring the Astral permanently into the United States. It is the finding of the court that his intention was to return the Astral to the Mediterranean, a fact that was indeed accomplished. See *In re Dorrance's Estate*, 163 Atl. 303, 309 Pa. 151 (1932) (intention required for the acquisition of a domicile of choice); *In re Dorrance's Estate*, 170 Atl. 601, 115 N.J. Eq. 268 (1934); *Restatement of Conflict of Laws 2d*, § 18 (1971). As a legal consequence of his intent not to bring the Astral permanently into the United States, the Astral was not, in customs law, an "importation" into the United States.

It is noteworthy that, in the *Prichard case*, the court resolved the question of intent on the basis of external circumstances. In that case, a yacht of Panamanian registry, purchased by Prichard, a United States resident, was brought into the United States, stopping first at Key West, Florida for fuel and then proceeding to Brownsville, Texas.

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[2] The *Study*, schedule 6, part 6, states at page 327:

"Items 696.05 through 696.15 reflect the existing treatment of yachts or pleasure boats and parts thereof under paragraph 370. Paragraph 370 in defining the term 'motor boats' provides that the term does not include 'a yacht or boat built, or for the building of which a contract was entered into, prior to December 1, 1927'. This provision has been dropped as obsolete."

The yacht was not allowed to clear from that port to go on to New Orleans until the owner filed a consumption entry and deposited estimated duties. Five days after arriving at New Orleans, the yacht went on to Havana, Cuba. All the clearance papers indicated that no cargo was carried, and it was agreed that Prichard had no intention of documenting her under the laws of the United States or of selling or chartering her to a United States resident.

Noting that there was "no direct evidence as to his intentions with respect to the yacht, and such intentions must be determined on the basis of circumstances" (43 CCPA at 88), the court found that the events therein justified the conclusion that the yacht was presumptively imported into the United States within the meaning of the Tariff Act of 1930 when she arrived at the port of Brownsville. The court stated:

> "* * * *The record is silent as to the purpose for which the yacht was brought to that port*, but since she was a pleasure ship and carried no cargo, the only reasonable presumption is that such purpose was a pleasure voyage, and the subsequent prompt departure of the yacht without cargo for New Orleans and Havana seems to strengthen the presumption.
>
> "Prichard was a resident of the United States and there is no evidence that he ever changed such residence or intended to do so. It is logical to suppose, therefore, that, although the yacht might be taken abroad whenever he so desired, its use would be based on the home port in the United States. We consider that, at least *in the absence of clear evidence to the contrary*, a resident of the United States who buys a pleasure yacht abroad and brings it to this country *must be presumed to intend to use it in this country* to such an extent as to make it properly classifiable as an import. [Emphais added.]" 43 CCPA at 88–89.

Thus, *Prichard* teaches that when a resident of the United States brings into this country a yacht that he has purchased abroad, there is a presumption that he intends to use it here "permanently," that is, that it constitutes an importation, "in the absence of clear evidence to the contrary."

From the uncontroverted testimony in the present case the court finds that Mr. Vanderstar at no time intended to bring the Astral permanently into the United States. The court also finds that he brought the Astral to the United States only temporarily for repairs, and as part of a general shakedown cruise which was intended to, and did, in fact, end in the Mediterranean. The extended duration of the Astral's stay, from November 1970 to the end of June 1971, was unanticipated and was caused by the need for extensive repairs. Indeed, because of the warranties by domestic manufacturers of various fittings and parts, and the unavailability of factory representatives in

earlier ports of call, such as Acapulco, it was to be expected that the repairs would be made in this country.

The fact that Mr. Vanderstar, his wife and friends may have occasionally used the yacht for their pleasure does not change the essential nature of the shakedown cruise.

Undoubtedly some of the work, such as the addition of a bunk and replacement of carpeting and upholstery, was in the nature of alterations and refurbishing. That, however, was minor compared to the time and effort expended making repairs on the hull, the diesel generators, the exhaust system, the air-conditioning compressor, the a.c. inverter, the toilets, the hot-water tank, the refrigerator and freezer system, and the rectangular portholes, among others, which were necessary to place the yacht into good operating condition.

It is also noted that the defendant has failed to offer any evidence in rebuttal. It has not been shown that these repairs were unnecessary, unduly prolonged, in the nature of only general maintenance, or that all or part of the Astral's stay in the continental United States or Hawaii was solely for pleasure cruising. It is also pertinent to note Mr. Vanderstar's testimony that he planned to move his interests to Europe where he had a considerable amount of business, and was also endeavoring to buy a house in the Mediterranean.

Nor has the defendant refuted plaintiff's claims that the Astral was intended to be used in the Mediterranean at the conclusion of her shakedown cruise; that certain features, such as the stern gangplank and shallow draft, were incorporated into her design for use in Mediterranean waters; that her shakedown cruise did terminate in the Mediterranean; and that, as of the time of trial, she was being readied for chartering in that area.

Additionally it may be noted that although the defendant now contends that the yacht was "imported," i.e., brought into the country "permanently," the district directors at San Diego and Honolulu apparently thought otherwise when they issued the cruising permits to the ship's master. If circumstances arose which warranted the Bureau's subsequent change of position, none has been stated, and the record is silent on this point.

In view of the foregoing, it is the determination of the court that the Astral was not brought permanently into the United States and hence was not "imported" within the meaning of general headnote 1 of the Tariff Schedules of the United States. Therefore, it was not subject to customs duty.

Judgment will issue accordingly.

Decisions of the United States Customs Court

Customs Decisions

(C.R.D. 74–7)

CONSOLIDATED MERCHANDISING CO. ET AL. *v.* UNITED STATES

Memorandum Opinion Accompanying Order

Court Nos. R70/4168 and 34 others; R70/6883 and 21 others; R70/7010; R70/7012 and 3 others

(Dated May 30, 1974)

Serko & Sklaroff (*Murray Sklaroff* of counsel) for the plaintiffs.
Carla A. Hills, Assistant Attorney General (*Andrew P. Vance* and *Velta A. Melnbrencis*, trial attorneys), for the defendant.

BOE, Chief Judge: Pursuant to an order of this court under date of April 24, 1974, the parties were directed to appear on May 14, 1974 and show cause why certain proposed decisions and judgments previously filed in connection with the above-entitled actions should not be signed and entered by the court. A review of the facts relating to said causes of action is appropriate in order to perceive the basic reasons upon which the decision of this court is predicated.

These actions, together with 128 additional cases, originally were a part of what is referred to by the rules of this court as the October 1970 reserve file, which comprised a total of approximately 177,000.[1] All cases included within this classification were to be removed therefrom by October 31, 1972, or thereafter be dismissed by the clerk of this court. (Rule 14.6(c).)

In its effort to remove the causes of action in question from the October 1970 reserve file, the plaintiffs entered into negotiations with the defendant for the purpose of securing stipulations on agreed

[1] The proposed decisions and judgments cover 60 actions in the October 1970 reserve file and two other actions; viz—R69/5995 and R68/1048.

statement of facts relating to said cases upon which proposed decisions and judgments might be submitted to this court.

In order to facilitate this procedure and upon appropriate motion by the plaintiffs, this court granted three extensions of time during which the actions in question might remain in the October 1970 reserve file. Two of such orders were granted by this court under dates of October 27, 1972, and October 5, 1973. The third and final motion for extension by the plaintiffs was made under date of October 29, 1973.

At a conference relating thereto with counsel on November 12, 1973, this court was advised that all but 70 of the original causes of action hereinbefore referred to had been the subject of stipulation by the respective parties and that decisions and judgments had been submitted to this court and duly entered. With respect to the remaining actions, counsel for both the plaintiffs and the defendant further advised the court that stipulations on an agreed statement of facts with respect thereto had been entered into and that proposed decisions and judgments would be submitted by the plaintiffs for defendant's approval and delivery to this court that date or the following day. Relying on such representation, the court granted an order under date of November 14, 1973, extending the time until January 1, 1974, during which the remaining causes of action in question might continue in the October 1970 reserve file prior to automatic dismissal by the clerk of this court.

On January 9, 1974 the causes of action in question were dismissed by the clerk of this court for lack of prosecution.[2] The defendant on January 29, 1974, however, filed with this court the decisions and judgments relating to the actions in question which had been submitted by the plaintiffs to the defendant at the time aforementioned.

On February 15, 1974 the plaintiffs moved to have the order of dismissal, entered under date of January 9, 1974, set aside and vacated to which motion the defendant objected on the grounds that the court lacked jurisdiction over the subject matter of the actions in question inasmuch as a timely motion for a "rehearing" had not been filed with this court within a period of thirty (30) days after the entry of the order of dismissal, pursuant to rule 12.1 of this court and title 28 U.S.C., section 2639.

At a further conference with counsel for the respective parties this court was advised by counsel for the defendant that the decisions and judgments had been submitted by plaintiffs on or about November 13, 1973, and that through inadvertence and mistake counsel for the defendant had failed to file the said decisions and judgments with the

[2] The two causes of action (R69/5995 and R68]1048) which were not part of the October 1970 reserve file had not been dismissed.

court until January 29, 1974. Counsel for plaintiffs, in turn, advised that through error and mistake, he failed to note the order of dismissal which had been entered by the clerk of this court under date of January 9, 1974, and had, accordingly, omitted to take remedial action with respect thereto until the date of the motion to set aside and vacate was filed with this court.

On March 11, 1974 this court made and entered its order setting aside and vacating the orders of dismissal previously entered under date of January 9, 1974, and restoring the causes of action in question to the October 1970 reserve file for a period to and including April 15, 1974.

The defendant subsequently filed motions to withdraw the stipulations on agreed statement of facts entered into by the respective parties and the proposed decisions and judgments which had been filed with this court as aforesaid. At a hearing with respect to said motions, requested by the defendant, the court was advised that the motion to withdraw the stipulations and proposed decisions and judgments was not predicated upon the merits thereof, but, rather, solely upon the fact that the instruments had been erroneously filed by the defendant subsequent to the order dismissing said actions. Counsel for plaintiffs and defendant having signed the stipulations on agreed statement of facts, it appeared to the court that neither party had a right of physical possession thereto to the exclusion of the other by the removal of the same from the files and records of this court. Accordingly, on April 24, 1974, this court denied the motions of the defendant and directed that these instruments be and remain a part of the files and records of the court.

On April 24, 1974 this court made and entered its order directing the parties to appear and show cause why the proposed decisions and judgments in connection with the causes of action on file herein should not be signed and entered as final decisions and judgments.

The court in making its decision is of the opinion that because of the expansive construction which previously had been placed upon title 28 U.S.C., section 2640, presently, as amended, section 2639, the reasoning of this court with respect to the application of said statute as it relates to the foregoing facts and circumstances should be set forth.

Title 28 U.S.C., section 2639 provides:

> The judge who has rendered a judgment or order may, upon motion of a party or upon his own motion, grant a retrial or a rehearing, as the case may be. A party's motion must be made or the judge's action on his own motion must be taken, not later than thirty days after entry of the judgment or order.

The fundamental question presented herein for determination, accordingly, is whether the aforequoted statute precludes this court from the exercise of its inherent judicial power to set aside and vacate a prior order of dismissal, which through the negligence, inadvertence, and mistake by the respective parties had been entered by this court.

The court is aware of and has given full consideration to the prior decisions construing title 28 U.S.C., section 2640.[3]

With due deference to my learned colleagues, however, I submit that I am unable to extend the reasoning and application of these decisions to the facts in the within proceeding.

The words "rehearing" and "retrial" have a distinct meaning in legal terminology. Their meaning in connection with the practice and procedure in the United States Customs Court cannot be said to be different from their meaning used in connection with the practice and procedure in other courts—federal or state. Nor does section 2639, aforequoted, reflect any intention to give to these words any meaning other than their ordinary and common usage.

In many of the prior decisions of this court, as well as in the decisions of other courts, scant effort has been made to define the meaning of the words "retrial" and "rehearing." This court, however, in the case of *Borneo-Sumatra Trading Company, Inc.* v. *United States*, 49 Cust. Ct. 510, A.R.D. 150 (1962), has given a succinct definition to these terms which have so often been used but with only passing generality.

> * * * By every intendment, the words "rehearing" and "retrial" presuppose an original hearing or an original trial and, hence, normally relate to decisions on the merits after a hearing has been held. * * * [*Supra*, at p. 513.]

To hold that every petition or a motion to set aside and vacate a prior order or judgment, irrespective of the facts, circumstances or reasons therefore constitutes, per se, a "rehearing" or "retrial" and, accordingly, subject to the time limitation provided by section 2639, is to place an unwarranted and unintended straightjacket on the inherent power of judicial discretion of this court.

The power of the Congress to fix the time within which a party litigant must avail itself of further procedural remedies is unquestioned. Time limitations necessarily must be imposed in order to maintain an orderly supervision of litigation. But a great distinction exists between the failure of a party litigant to pursue his remedy within a period prescribed by statute or rule, and the right of a party litigant

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[3] *Kaiser Reismann Corp. et al.* v. *United States*, 47 Cust. Ct. 363, Abstract 66205 (1961). *Gehrig, Hoban & Co., Inc.* v. *United States*, 49 Cust. Ct. 403, Reap. Dec. 10343 (1962). *Aut Customs Brokers, Inc.* v. *United States*, 49 Cust. Ct. 427, Reap. Dec. 10356 (1962). *United States* v. *Williams, Clarke Company*, 52 Cust. Ct. 639, A.R.D. 173 (1964).

to seek relief from the entry of orders or judgments because of excusable neglect, in advertence, fraud or mistake. Required conformance to act within a prescribed statutory time period with respect to perfecting an appeal or with respect to the retrial of an action upon the merits is not inconsistent with the discretionary power which a court must exercise in the accomplishment of its primary obligation—the determination of justice. In the latter instance, it may be said that the court acts only to permit that which may have been done to be undone and the parties restored to their original position.

Such a distinction is well illustrated by rule 59 and rule 60(b) of the Federal Rules of Civil Procedure. By rule 59 it is provided that a motion for a new trial must be served not later than ten (10) days after the entry of the judgment. From rule 60(b) it is evident, however, that the relief provided for thereunder is recognized and intended to be separate and distinct from any statutory provision or rule providing a fixed and inflexible time period during which further procedural remedies might be sought. A greater and more extensive period of time is permitted by rule 60(b) during which a party by reason of special facts and circumstances—in the court's sound discretion—may be deemed to justify such relief.

In view of the distinction thus recognized by the Federal Rules of Civil Procedure, it is difficult, indeed, to perceive how the terms "rehearing" and "retrial," referred to in section 2639, can be given such a comprehensive construction as to include within its orbit the motion to vacate the order of dismissal entered January 9, 1974 in the within proceedings—an order which had never been determined on its merits and which, unquestionably, was entered because of the concurrent mistake and inadvertence of counsel for plaintiffs and defendant under a unique procedure provided by the rules adopted by the United States Customs Court and never in existence at the time of the enactment of the statute in question. I refer in particular to the October 1970 reserve file and the unusual volume of cases included therein.

The United States Customs Court is a duly constituted court of the United States, declared to be a court established under article III of the Constitution of the United States, 28 U.S.C., section 451, and section 251, as amended by Act of July 14, 1956. As stated in *Borneo-Sumatra Trading Company, Inc.* v. *United States*, *supra*, it is "* * * clothed with all the inherent powers of a Federal district court, and authorized to apply the same rules of evidence, practice, and procedure. 28 U.S.C., sections 452, 1581; *United States* v. *Western Electric Company*, 26 Cust. Ct. 531, Reap. Dec. 7954. * * *" (P. 514.)

The conscience of this court will not permit the rights of a party litigant to be summarily extinguished because of a presumed limitation upon the inherent power of this court. Therefore, in the absence of a rule of procedure applicable to the facts and circumstances herein, the prerogative provided by rule 1.1(b) of this court has been invoked.

Let an order be entered directing that the decisions and judgments previously filed with the court on January 29, 1974, accordingly, be signed and entered as final decisions and judgments.

The conscience of this court will not permit the rights of a party litigant to be summarily extinguished because of a presumed limitation upon the inherent power of the court. Where, as in the instant case, a rule of procedure applicable to the facts and circumstances herein, the prerogative provided by rule 11 (b) of this court has been invoked.

Let an order be entered directing that the decisions and judgments previously filed with the court on January 28, 1957, accordingly be signed and entered as the decisions and judgments.

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *June 3, 1974.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

VERNON D. ACREE,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P74/352	Ford, J. May 29, 1974	Laconia Needle Mfg. Co.	67/47326, etc.	Item 657.20 19%	Item 609.88 8.5%	Pistorino & Company, Inc. v. U.S. (C.D. 4373)	Boston Metal stampings
P74/353	Ford, J. May 29, 1974	Laconia Needle Mfg. Co.	69/22642	Item 670.58 80¢ per 1000 plus 24%	Item 609.88 8%	Pistorino & Company, Inc. v. U.S. (C.D. 4373)	Boston Metal stampings

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P74/354	Ford, J. May 29, 1974	Laconia Needle Mfg. Co.	70/64008	Item 670.58 80¢ per 1000 plus 24%	Item 609.88 8%	Pistorino & Company, Inc. v. U.S. (C.D. 4373)	Boston Metal stampings
P74/355	Ford, J. May 29, 1974	Laconia Needle Mfg. Co.	70/64020, etc.	Item 670.58 70¢ per 1000 plus 21%	Item 609.88 7.5%	Pistorino & Company, Inc. v. U.S. (C.D. 4373)	Boston Metal stampings
P74/356	Richardson, J. May 29, 1974	Bombardier, Ltd., et al.	72-5-01180, etc.	Item 692.35 or 692.16 6.5% or 5.5%	Item 692.30 Free of duty	U.S. v. F. W. Myers & Co., Inc. (C.A.D. 1097)	Champlain (Ogdensburg) Tractors and parts of tractors
P74/357	Landis, J. May 29, 1974	Beck-Arnley Corp.	73-5-02221	Item 653.39 19%	Item 683.65 4%	Warshawsky & Company v. U.S. (C.D. 4410)	New York Driving lights and fog lights
P74/358	Landis, J. May 29, 1974	Joseph Lucas North America, Inc.	73-7-01971	Item 653.39 19%	Item 683.65 4%	Warshawsky & Company v. U.S. (C.D. 4410)	New York Driving lights and fog lights
P74/359	Watson, J. May 29, 1974	G. R. Bolton, Inc.	72-2-00302	Item 748.20 26.5%, 23.5% or 22%	Item 774.60 15%, 11.5% or 10%	Joseph Markovits, Inc. v. U.S. (C.D. 4306) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185)	Los Angeles Artificial flowers, etc.
P74/360	Watson, J. May 29, 1974	W. J. Byrnes Co. et al.	67/5837, etc.	Item 748.20 28%, 26.5%, 25% and 23.5%	Item 774.60 17%, 15%, 13.5% or 11.5%	Armbee Corporation et al. v. U.S. (C.D. 3278); Zunoid Trading Corporation et al. v. U.S. (C.D. 3279); Joseph Markovits,	Los Angeles Plastic artificial flowers, etc. (items marked "A" and "B")

						Inc. v. U.S. (C.D. 4196); First American Artificial Flowers, Inc. v. U.S. (C.D. 4185)	
P74/361	Watson, J. May 29, 1974	Marcus Display Industries, Inc.	71-10-01522	Item 748.20 23.5%	Item 774.60 11.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Boston Artificial flowers, etc.
P74/362	Newman J. May 29, 1974	James G. Wiley Co., a/c Lion Sales & Mfg. Co., et al.	67/7309, etc.	Item 657.35 1.275¢ per lb. plus 15% (items marked "B", "D" and "F")	Item 654.00 10% (items marked "B" and "D") Not entireties as assessed; require finding of separate values; appraisement and liquidation void; protests dismissed; entry papers returned to district director for further administrative action (items marked "F")	The Westbrass Company v. U.S. (C.D. 4293) (items marked "B") Hancock Gross Mfg., Inc. v. U.S. (C.D. 3459); Davies, Turner & Company v. U.S. (Abs. 69651); The Westbrass Company v. U.S. (C.D. 4293) (items marked "D") Hancock Gross Mfg., Inc. v. U.S. (C.D. 3459); The Westbrass Company v. U.S. (C.D. 4293) (items marked "F")	Los Angeles Shower heads or shower drains, used as shower fixtures or parts of showers (items marked "B") Sink strainers with insert baskets, flat sink strainers, and replacement insert baskets for strainers, all of brass (items marked "D") Strainer stoppers and their bases (items marked "F")

Decisions of the United States Customs Court

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	UNIT OF VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R74/243	Re, J. May 29, 1974	Bentley Markey & Co. et al.	R58/21578, etc.	Export value: Net appraised value less 7¼%, net packed	Not stated	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	San Francisco Japanese plywood
R74/244	Re, J. May 29, 1974	M. S. Cowen Company et al.	R59/710, etc.	Export value: Net appraised value less 7¼%, net packed	Not stated	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	Tampa Japanese plywood

Judgment of the United States Customs Court In Appealed Case

MAY 29, 1974

APPEAL 5511.—United States *v.* Volkswagen of America, Inc.—PAINTS—CHEMICAL MIXTURES—PLASTICS MATERIALS—TSUS.—C.D. 4348 affirmed April 18, 1974. C.A.D. 1115.

Appeals To United States Court of Customs and Patent Appeals

APPEAL 74-31.—Certified Blood Donor Services, Inc. *v.* United States.—RABBIT ANTISERA—DIAGNOSTIC SERA—NONENUMERATED PRODUCTS—THERAPEUTIC SERUMS, ANTI-TOXINS, ANALOGOUS BIOLOGICAL PRODUCTS—TSUS. Appeal from C.D. 4509.

In this case, certain rabbit antisera was held properly dutiable as assessed at 9 percent ad valorem under the provision in item 799.00, Tariff Schedules of the United States, for "Other" articles not provided for elsewhere in the tariff schedules. Plaintiff-appellant claimed that the merchandise was free of duty under the provision in item 437.76 for "Viruses, therapeutic serums, vaccines, toxins, antitoxins, and analogous biological products".

It is claimed that the Customs Court erred in overruling the protest and in failing to sustain plaintiff's claim for classification of the imported diagnostic sera free of duty under item 437.76, supra; in not sustaining one or more of the plaintiff's alternative contentions that the imported sera were "therapeutic serums", "antitoxins" or "analogous biological products" within the meaning and intent of item 437.76; in finding and holding that "therapeutic serums" are those serums containing antibodies which are used in vivo as immunological agents for the conferring of passive immunity to certain diseases; in not finding and holding that serums used in the diagnosis of disease in human beings are therapeutic serums whether used in vitro or in vivo; in holding that "Furthermore, in determining whether the imported antisera fall within the purview of item 437.76, it is a relevant consideration that at the time of importation of the antisera no license was issued or required by the Secretary of Health, Education and Welfare pursuant to 42 U.S.C. Section 262, as stipulated by the parties"; in not taking judicial notice of the fact that the Commissioner of Food and Drugs of the Department of Health, Education and Welfare published notice in the *Federal Register*, Vol. 37, No. 12, January 19, 1972, page 819, that "In Vitro Diagnostic Products for Human

Use" were subject to regulatory authority under the Federal Food, Drug and Cosmetic Act, and on August 17, 1972 published Proposed Regulations to establish standards for such products (*Federal Register*, Vol. 37, No. 160, pages 16613–16617); in finding and holding that the decision in *Air-Express International Agency, Inc., a/c Hyland Laboratories* v. *United States*, 52 Cust. Ct. 254, Abs. 68288 (1964), was not determinative of the interpretation of "therapeutic" in item 437.76; in not finding and holding the judicial determination of the common meaning of "therapeutic" as that term appeared in paragraph 1610, Tariff Act of 1930, was applicable to item 437.76 wherein "therapeutic" also appears; in finding and holding that the imported diagnostic sera were not "antitoxins" because they were not used in vivo to inoculate individuals; in finding and holding that the rabbits were not inoculated with toxins or toxoids and, consequently, the antibodies produced in the rabbits' blood were not antitoxic in nature; in not finding and holding that the imported sera were antitoxins because they contained antibodies for specific antigens resulting from certain forms of cancer in the human body; in not finding and holding that the imported sera were antitoxins within the meaning and intent of item 437.76; in finding and holding that the imported sera were not analogous biological products to either therapeutic serums or antitoxins; in finding and holding that the use of the imported sera in vitro rather than in vivo precluded a holding that they were analogous to either therapeutic serums or to antitoxins; and in not finding and holding that the imported sera were analogous to both therapeutic serums and to antitoxins within the meaning and intent of item 437.76.

APPEAL 74–32.—Avins Industrial Products Co. *v.* United States.—METAL PRODUCTS—ROUND WIRE OF ALLOY IRON OR STEEL—PARTS OF RADIO ANTENNAS—TSUS. Appeal from C.D. 4503, rehearing denied C.D. 4522.

The merchandise in this case consists of stainless steel wire, type 302, imported in varying lengths from 12″ to 26.5″, not over 0.703″ in maximum cross-sectional dimension. It was assessed with duty at 10.5 percent ad valorem under item 609.45, Tariff Schedules of the United States, as round wire of alloy iron or steel, plus 0.9 cents per pound on the chromium content in excess of 0.2 percent under item 607.01. Plaintiff-appellant claimed that the merchandise constitutes parts of antennas for automobile radio receivers and is properly dutiable at 7 percent under item 685.25. The case was submitted on a sample of the merchandise and a stipulation of facts. The Customs Court held that the merchandise was properly dutiable as assessed and the action was dismissed.

It is claimed that the Customs Court erred in overruling the protest claims for classification of the imported merchandise as parts of antennas for automobile radio receivers and dismissing the action; in finding and holding, in substance, that as a matter of law, merchandise falling within the definition of wire is not a part, finished or unfinished, within the intent of Congress and is not precluded from classification under item 609.45 by virtue of headnote 1(iv), schedule 6, part 2, TSUS; in finding and holding that it is not clear from the stipulated facts that the imported wire product was incapable of being made into more than one article so as to fix its status as a part; in not finding and holding that the imported articles consisted of parts of antennas, being solely used as parts of such articles, within the intendment of TSUS General Interpretative Headnote 10(ij); in not finding and holding that the stipulated facts establish the status of the imported wire products as being dedicated to use as identifiable parts of radio antennas; and in not finding and holding that the imported articles had not other use but to be finished into antenna sections, and that such sections were used solely as parts of radio antennas.

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